TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted] 211

[redacted] RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

BYRON B. MARIETTA.

IN ERROR TO THE COURT OF APPEALS OF RICHLAND COUNTY, STATE OF OHIO.

FILED AUGUST 4, 1919.

(24,968)

(24,868)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 585.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

BYRON B. MARIETTA.

IN ERROR TO THE COURT OF APPEALS OF RICHLAND COUNTY, STATE OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 23, 1916.

1 In Richland County Common Pleas Court.

BYRON MARRIETTA, a Minor, by His Next Friend, P. W. HECHT, Plaintiff,

vs.

ERIE RAILROAD COMPANY, Defendant.

Petition.

Plaintiff says that he is nineteen years of age and brings this action by his next friend. He says that the Erie Railroad Company is a corporation and as such it operates a railroad, with its tracks, cars, engines and other equipments, in the State of Ohio and at the time of the committing of the grievances hereinafter set forth operated said railroad within and through the County of Richland in said State. That on the 5th day of January, 1912, and for a period of about six weeks prior thereto the plaintiff was in the employ of defendant as a section man and as such section man it was his duty to work on the track of defendant wherever directed by the section foreman and on a section extending from Pavonia in said County westward and a distance of about 5 or 6 miles.

Plaintiff says that at some time the day before, or at such times as it was convenient to do so, the section foreman, under whom plaintiff worked, would direct the men, including plaintiff, where to work the next day and at what point on the line of the section they were to come to work or to be carried to the place

2 where work was to be done on the track; that just prior to the time plaintiff received the injuries hereinafter set forth he was directed by the foreman to come from the place where he boarded to a point about a quarter of a mile north or east of a tower located on this section as defendant's track upon which he was employed as aforesaid; that in obedience to said directions he walked to the defendant's track from his boarding place and started east on the track to go to the place as directed by the foreman and there to work in the morning of the said 5th day of January.

Plaintiff says that at the place where he received his injuries the defendant's road is a double track and for a long distance north and south there is a double track; that the north track is used for trains going west and the south track used for trains going east; that just before plaintiff started east on the track to go to the place where he was to work a west bound freight train passed on the north track and plaintiff walked east on the east bound track and when he had walked a short distance an east bound passenger train came down the track on which he was walking and to get out of its way he stepped over onto the west bound track and was struck and run over by an engine in charge of an engineer of the defendant which engine was running backward

and in the opposite direction from the direction trains run on said track.

Plaintiff says that the engineer of said engine had under his control and direction a fireman and other employees of defendant's Company were on said engine at the time plaintiff was
3 struck and run over and he had the control and direction of the engine and men at the time.

Plaintiff says that said engine was running in the same direction as the passenger train on the east bound track and running on the track parallel to the track upon which said passenger train was running and as near as plaintiff knows the said engine was running along side the passenger train or so near its rear that plaintiff was struck before he had time to step off the track.

Plaintiff says that the smoke and steam of the passenger train obscured his vision in the direction from which said engine approached so that he did not and could not see it and he could not hear it for the noise and that he believed at the time that no train or engine could approach from the direction the engine approached and that if said engine had helped the said freight train up the grade it had been the custom to push the other train to the top of the grade which was about two miles from where plaintiff was struck and if such custom had been followed the engine could not have been at the place where plaintiff was struck.

Plaintiff says that said engine approached the point where he was struck at a high rate of speed, to wit, about 40 miles an hour running along side the passenger train or at its rear end obscured from vision by the smoke and steam of the train without any signals by bell or whistle to give notice that it was running parallel with the passenger train in a direction opposite to the direc-
4 tion of trains on this track and he avers that the engineer and other employees on the engine knew that the men employed on the section including the plaintiff would, at this time be going to their work on and over the tracks of defendant and they knew plaintiff was on the track and that running an engine along side a rapidly moving passenger train in the direction it was going without signal by bell or whistle would endanger the lives and limbs of the section men going to their work and that it was gross negligence to run an engine upon the west bound track in the opposite direction and along side or so near another train running in the same direction and plaintiff says that it was by the gross negligence of the defendant's servants and agents in the particulars alleged and while he was exercising due diligence for his own safety in looking and listening for a train or engine and without any fault on his part he was run over by said engine and injured as hereinafter alleged and defendant was negligent in not providing rules and regulations requiring notice or signals in such a case, and in not instructing plaintiff as to the dangers of the situation.

Plaintiff says that he was struck by said engine and the engine passed over him; that he received the following injuries, viz; h

right hip bone was broken, his right leg broken below the knee, his left leg broken, his left arm broken, the fingers of his right hand injured and the index finger and the third finger had their ends cut off, a wound five inches in extent in his head, his left shoulder blade broken and his right collar bone broken. He says that he was confined to a bed in the hospital ten weeks, that he suffered agony and pain both mental and physical and that he is crippled so that he will never be able to do any labor. He says that his right leg hangs loose and that he has no control over it and that — will be compelled to use crutches throughout his life. He says that he has been otherwise injured by being run over as results from the injuries stated and that his life has been shortened and that he will be compelled to suffer pain all his life.

Wherefore he prays judgment for $35,000.00.

W. S. KERR,
Attorney for Plaintiff.

STATE OF OHIO,
Richland County, ss:

P. W. Hecht being duly sworn says that the allegations of his foregoing petition are true as he believes.

P. W. HECHT.

Subscribed and sworn to before me this — day of July, 1912.

[Notarial Seal, Richland County, O.]

C. O. SHELLER,
Notary Public.

Notary fees $.40.

[Endorsed:] Petition. Byron Marrietta, a minor, by his next friend vs. Erie Railroad Co. Filed Court of Appeals, Oct. 10, 1914, Richland County, Ohio, J. V. Finney, Clerk. Petition, Filed Court of Appeals, October 10, 1914, Richland County, Ohio, — Clerk. Clerk issue summons for Deft. to Sheriff, Richland Co., and endorse: Plaintiff prays judgment in the sum of $35,000. W. S. Kerr, Attorney for Plaintiff. Filed July 27, 1912, J. M. Ottinger, Clerk, Richland County, Ohio. Filed March 25, 1915, Supreme Court of Ohio, Frank E. McKean, Clerk.

9 STATE OF OHIO,
Richmond County, ss:

In the Court of Common Pleas.

BYRON MARIETTA, a Minor, by His Next Friend, P. W. HECHT,
Plaintiff,
vs.
ERIE RAILROAD COMPANY, Defendant.

Amended Answer.

The Erie Railroad Company, defendant, for amended answer herein says: It admits that at the commencement of this action plaintiff was under the age of 21 years, but for want of knowledge denies that he is now under that age.

It admits that it is and at all times in the petition mentioned was, a corporation operating a railroad extending through Richland County, Ohio, with the tracks, cars, engines, and equipment thereof.

It admits that for a period of six weeks next prior to January 5, 1912, plaintiff was in its employ as a section man, on a section extending from Pavonia westerly for some distance.

It admits that before the hours of work on the morning of January 5, 1912, he was struck by an engine operated by its engineer and backing eastward on the so-called west-bound track of said railroad (there being then on said engine others of its employees, including a foreman subject to orders of such engineer).

It admits that plaintiff thereby received certain injuries, but for want of knowledge denies plaintiff's allegations as to their nature, extent, and effect.

It further says that if there was any negligence on its part in the premises (which it denies), plaintiff's own lack of due and reasonable care in the premises proximately contributed to such injuries, in going to and being at the point where he was struck, although he knew, or by the exercise of due and reasonable
10 care on his part would have known, of the risk involved, and omitted to exercise due and reasonable care for his own safety.

It further says that said railroad extends from Ohio into other States of the United States of America, and at all times in the petition mentioned it conducted over said railroad, and each part thereof, commerce between Ohio and such other States, as a common carrier by railroad: that all plaintiff's duties in its employ were in the maintenance of said railroad, its tracks and roadbed, in suitable condition for use in such interstate commerce: and that if plaintiff's being on defendant's premises at the time of his being so injured, was because of his being in its employ (which it denies) or by virtue of any direction, permission or license given him as its employee (which it also denies) plaintiff can maintain no action against defendant for such injuries, not brought by virtue of the Act of the Congress of the United States, approved April 22, 1908, and entitled "An Act relating to the liability of common carriers by railroad to

their employees in certain cases," whereas this action is not so brought.

ERIE RAILROAD COMPANY,
By McBRIDE & WOLFE, *Its Attorneys.*

STATE OF OHIO,
Richland County, ss:

C. E. McBride being duly sworn says that he is the attorney of Erie Railroad Company, defendant, a corporation, and that the allegations of the foregoing answer are true as he believes.

C. E. McBRIDE.

Subscribed by the said C. E. McBride in my presence, and by him sworn to before me this 14 day of October, 1913.

[Notarial Seal, Richland Co., Ohio.]

C. H. WORKMAN,
Notary Public.

Tax 40 cts.

11 [Endorsed:] 60/88. #11988. In Richland County, Ohio, Common Pleas. Byron Marietta, a minor by his next friend, P. W. Hecht, Plaintiff, vs. Erie Railroad Company, Defendant. Amended Answer. Filed, Court of Appeals, Richland County, Ohio, Oct. 10, 1914. J. V. Finney, Clerk. Amended Answer. Filed Oct. 18, 1913. J. V. Finney, Clerk Common Pleas Court. McBride & Wolfe, Attorneys for Defendant. 127/165. Ans.. Amen. Ans. Filed Mar. 25, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

12 In Richland County Common Pleas Court.

BYRON MARRIETTA, a Minor, etc., Plaintiff,
vs.
THE ERIE RAILROAD COMPANY, Defendant.

Reply.

The plaintiff for reply, says that on or about January —, 1914, and since the filing of the petition, he arrived at full age and for reply to the amended answer of defendant, says that he denies each and every allegation of said amended answer, and he says that the case proceed in his own name and right.

W. S. KERR,
Attorney for Plaintiff.

STATE OF OHIO,
Richland County:

Byron Marietta, the plaintiff, being duly sworn, says that the allegations of the foregoing reply are true as he believes.

BYRON B. MARIETTA.

Subscribed and sworn to before me, this 15th day of April, 1914.

[Notarial Seal, Richland County, Ohio.]

JOHN IRVIN,
Notary Public.

Notary fees 40 cts.

13-15 [Endorsed:] Reply. Byron Marietta vs. Erie R. R. Co. #11988. 60/88. Reply. Filed Apr. 27, 1914. J. V. Finney, clerk, Richland Co., O. Filed, Court of Appeals, Richland County, Ohio, Oct. 10, 1914. J. V. Finney, Clerk. Supreme Court of Ohio. Filed Mar. 25, 1915. Frank E. McKean, clerk.

16 *Transcript of Appearance Docket and Journal Entries to Circuit Court.*

Revised Statutes, Secs. 6716, 6718. See O. L. 1884, pp. 168, 172.

THE STATE OF OHIO,
Richland County, ss:

In the Court of Common Pleas.

No. 11988.

BYRON MARIETTA, a Minor, by His Next Friend, P. W. HECHT,
Plaintiff,
vs.
ERIE RAILROAD COMPANY, Defendant.

The following are the Appearance Docket Entries and the Journal Entries in said case:

Appearance to August 24", 1912.

#11988.

BYRON MARIETTA, a Minor, by His Next Friend, P. W. HECHT,
vs.
ERIE RAILROAD COMPANY.

W. S. Kerr.
McBride & Wolfe.

July 27", 1912, Petition, affidavit and Præcipe filed, and Summons issued to Sheriff, Richland County, Ohio. July 29/12 Summons returned and filed. Aug. 22/12, Motion to make petition more definite and certain and Brief filed. April Term, 1912, Con. J. 59/385. Sept. Term 1912, Con. J. 59/512. Jan. Term 1913, Con. J. 60/22. April Term 1913, Con. J. 60/182. Sept. 27/13 (Sept. Term) Leave to answer in 30 days, J. 60/200.

Oct. 8/13, Answer filed. Oct. 18/13, Amended Answer filed. Oct. 18/13 Leave to file Amended Answer instanter, J. 60/229. Sept. Term 1913, Con. J. 60/316. Jan. Term 1914, Con. J. 60/384. April Term 1914, (Apr. 15) Leave to reply instanter, J. 60/398. Apr. 27/14 Reply filed. April 27/14 (April 60/412. April 29/14 (Apr. Term) Jury Impaneled and sworn, Testimony in part, J. 60/417. April 30/14 (April Term) trial in progress, J. 60/419. May 1/14 (April Term) Further progress of trial J. 60/420. May 4/14, (April Term) Verdict for Plaintiff, $12,000.00, J. 60/424. May 5/14, Motion (Def't's) for new trial. filed. April Term Aug. 14/14 Motion overruled, Judgment on verdict vs. Def't for $12,000.00 and costs, J. 60/522. Sept. 23/14 Def't's Bill of Exceptions filed and notice given counsel for Plaintiff. Sept. 24/14, Oct. 3/14 Bill of Exceptions received from trial Judge and filed, J. 60/574.

17 108" Day, April Term, Richland Common Pleas Court, August 31", 1912.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

Continued.

84" Day, September Term, Richland Common Pleas Court, January 4", 1913.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

Continued.

64" Day, January Term, Richland Common Pleas Court, April 5", 1913.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

Continued.

135″ Day, April Term, Richland Common Pleas Court, September 13″, 1913.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

Continued.

12″ Day, September Term, Richland Common Pleas Court, September 27″, 1913.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

Leave to answer in 30 days.

30″ Day, September Term, Richland Common Pleas Court, October 18″, 1913.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

Leave to file amended answer instanter.

92″ Day, September Term, Richland Common Pleas Court, January 3″, 1914.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

Continued.

71" Day, January Term, Richland Common Pleas Court, April 4", 1914.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

Continued.

9" Day, April Term, Richland Common Pleas Court, April 15", 1914.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

Leave to reply instanter.

19" Day, April Term, Richland Common Pleas Court, April 27", 1914.

#11988.

BYRON MARIETTA, a Minor, etc.,
vs.
ERIE RAILROAD COMPANY.

This cause comes on for hearing upon the application of plaintiff by his next friend, and upon making it appear to the court that he has arrived at full age since beginning his case, and desiring to prosecute the case in his own name; it is ordered that the case proceed in the name of Byron Marietta as plaintiff.

21" Day, April Term, Richland Common Pleas Court, April 29", 1914.

#11988.

BYRON MARIETTA
vs.
ERIE RAILROAD COMPANY.

This day came the said parties hereto by their attorneys, also came the following named persons as jurors, towit: 1. F. S. Boals, 2.

W. C. Daugherty, 3. A. J. Spitler, 4. Thomas Kern, 5. O. F. Landis, 6. T. H. Dickerson, 7. Walter Hout, 8. Isaac Thrush, 9. James Page 10, Austin Teeter, 11. James M'Kinley, 12. John Kern, who were duly impaneled and sworn according to law, and the trial of this cause proceeded; said jury having heard the statements of counsel and a portion of the testimony adduced, were duly cautioned and excused until tomorrow morning at 9 o'clock.

22" Day, April Term, Richland Common Pleas Court, April 30", 1914.

18 #11988.

BYRON MARIETTA
vs.
ERIE RAILROAD COMPANY.

This day again came the said parties hereto by their attorneys, also came the jury heretofore impaneled and sworn, and the trial of this cause proceeded; said jury having heard a further portion of the testimony adduced, and at the close of plaintiff's testimony, defendant moved the court to arrest the case from the jury, and direct a verdict for the defendant, which motion was argued by counsel, and the court being fully advised in the premises does overrule said motion, to which ruling the defendant at the time excepted; thereupon the jury was duly cautioned and excused until tomorrow morning at 9 o'clock.

23" Day, April Term, Richland Common Pleas Court, May 1", 1914.

#11988.

BYRON MARIETTA
vs.
ERIE RAILROAD COMPANY.

This day again came the said parties hereto by their attorneys, also came the jury heretofore impaneled and sworn, and the trial of this cause proceeded; said jury having heard a further portion of the testimony adduced, were duly cautioned and excused until Monday morning at 10 o'clock.

25" Day, April Term, Richland Common Pleas Court, May 4", 1914.

#11988.

BYRON MARIETTA
vs.
ERIE RAILROAD COMPANY.

This day again came the said parties hereto by their attorneys, also came the jury heretofore impaneled and sworn, and the trial of this cause proceeded; Said jury having heard the remaining testimony adduced, arguments of counsel and charge of the court, retired to their room in charge of the court bailiff for deliberation; Now come said jury into open court with their verdict in writing, signed by their foreman and say:

"We, the jury in this case, do find for plaintiff, and assess his damages at ($12,000.00) Twelve Thousand Dollars.

O. F. LANDIS, *Foreman.*"

112" Day, April Term, Richland Common Pleas Court, August 14", 1914.

#11988.

BYRON MARIETTA
vs.
ERIE RAILROAD COMPANY.

This cause now coming on for hearing on the motion of the defendant for a new trial, the court on consideration, overrules the same. It is therefore considered by the court that the said plaintiff recover from the said defendant the said sum of Twelve Thousand ($12,000.00) Dollars, as heretofore found due him together with his costs herein expended. To all of which ruling and judgment, the defendant at the time excepted.

18" Day, September Term, Richland Common Pleas Court, October 3", 1914.

#11988.

BYRON MARIETTA
vs.
ERIE RAILROAD COMPANY.

Now comes the defendant and presents to the court its certain Bill of Exceptions herein, which being found by the court to be true, is allowed, signed and sealed, and on motion is hereby made a part of the record of this case.

19 THE STATE OF OHIO,
Richland County, ss:

I, J. V. Finney, Clerk of the Court of Common Pleas in and for said County, do hereby certify that the foregoing is a true transcript of the Appearance Docket and Journal Entries of said Court in the above entitled cause; and I further certify that the papers herewith sent, or the original papers and pleadings filed in said cause.

In Testimony Whereof, I hereunto set my hand and affix the Seal of said Court of Common Pleas on this 10" day of Oct., A. D. 1914.

J. V. FINNEY, *Clerk,*
By W. S. PEALE,
Deputy Clerk.

[Endorsed:] No. 11988, Doc. 60, Page 88. Common Pleas Court, Richland County, Ohio. Byron Marietta, Plaintiff, vs. Erie Railroad Co., Defendant. Transcript of Appearance Docket and Journal Entries. W. S. Kerr, Plaintiff's Att'y; McBride & Wolfe, Defendant's Att'y. Filed, Court of Appeals, Richland County, Ohio, Oct. 10, 1914. J. V. Finney, Clerk, Supreme Court of Ohio. Filed Mar. 25, 1915. Frank E. McKean, Clerk.

20 In the Court of Common Pleas of Richland County, O.

BYRON MARIETTA, by His Next Friend, P. W. HECHT, Plaintiff,
vs.
ERIE RAILROAD COMPANY, Defendant.

Motion for New Trial.

The defendant moves the Court for a new trial in the above entitled cause for the following reasons to wit:—

First. The verdict is against the weight of the evidence.

Second. The verdict is contrary to law.

Third. The verdict is so excessive as to appear to have been given under passion and prejudice.

Fourth. The Court erred in the admission of evidence objected to by the defendant.

Fifth. The Court erred in rejecting evidence offered by the defendant.

Sixth. The Court erred in refusing to charge the jury as requested by the defendant.

Seventh. The Court erred in charging the jury.

Eighth. The Court erred in overruling the motion to direct a verdict made at the close of plaintiff's testimony and renewed at the close of all the testimony.

Ninth. Misconduct of counsel for the plaintiff during the trial of said case.

Tenth. The verdict was given for the plaintiff when it should have been for the defendant.

Eleventh. The petition does not state a cause of action.

McBRIDE & WOLFE,
Att'ys for Defendant.

21 [Endorsed:] 60/88. No. 11988. Byron Marietta, etc., Plaintiff, vs. Erie R. R. Co., Defendant. Motion for New Trial. McBride & Wolfe, Att'ys for Def't. Filed May 5, 1914. J. V. Finney, Clerk Common Pleas Court. Filed, Court of Appeals, Richland County, Ohio, Oct. 10, 1915. J. V. Finney, Clerk.

22 In the Court of Appeals, Richland County, O.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON MARIETTA, Defendant in Error.

Petition in Error.

Plaintiff in Error says that at the April Term, 1914, of the Court of Common Pleas of Richland County, Ohio, defendant in Error recovered a judgment by the consideration of said Court against Plaintiff in Error in a case then pending therein wherein Defendant in Error was Plaintiff and Plaintiff in Error was defendant.

A transcript of the docket and journal entries thereof together with the original papers and bill of exceptions is filed herewith.

There is error in said record and proceedings in this to wit:—

First. That the Court erred in overruling the motion of Plaintiff in Error for a new trial.

Second. The verdict and judgment are against the weight of the evidence.

Third. The verdict and judgment are contrary to law.

Fourth. The verdict is so excessive as to appear to have been given under passion and prejudice.

Fifth. The Court erred in the admission of evidence objected to by the Plaintiff in Error.

Sixth. The Court erred in rejecting evidence offered by the Plaintiff in Error.

Seventh. The Court erred in charging the jury.

Eighth. The Court erred in refusing to charge the jury as requested by the several requests of the plaintiff in Error.

23 Ninth. The Court erred in overruling the motion of the Plaintiff in Error at the close of testimony of Defendant in Error and renewed at the close of all the testimony to direct a verdict for the Plaintiff in Error.

Tenth. Misconduct of counsel for the Defendant in Error during the trial of said case.

Eleventh. The Common Pleas Court had no jurisdiction to hear and determine this matter for the reason that the same is subject to

the jurisdiction of the United States District Court by reason of the fact that it comes under the Interstate Commerce Laws.

Twelfth. That there is a Federal question involved in this case and that the Court failed and refused to charge on that subject as requested by the Plaintiff in Error.

Thirteenth. The verdict was given for the Defendant in Error when it should have been given for the Plaintiff in Error.

Fourteenth. The petition does not state a cause of action.

Fifteenth. For other errors apparent on the record.

Plaintiff in Error therefore prays that said judgment may be reversed and that it may be restored to all things it has lost by reason thereof.

McBRIDE & WOLFE,
Att'ys for Plaintiff in Error.

Service of summons in above case is waived and appearance of Defendant in Error is voluntarily entered.

W. S. KERR,
Att'ys for Defendant in Error.

24 [Endorsed:] No. 52. Erie Railroad Co., Pl'ff in Error, vs. Byron Marietta, Def't in Error. Petition in Error. McBride & Wolfe, Att'ys for Pl'ff in Error. Filed, Court of Appeals, Richland County, Ohio, Oct. 10, 1914. J. V. Finney, Clerk. Filed Mar. 25, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

25 In the Court of Appeals, Richland County, Ohio, January Term, 1915.

No. 52.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON MARRIETTA, a Minor by His Next Friend, P. W. HECHT, Defendant in Error.

Opinion.

By the COURT:

This case is in this court upon a petition in error brought for the purpose of reversing the judgment of the Court of Common Pleas of said county in said case, wherein the plaintiff in error was defendant below and the defendant in error was plaintiff below.

Without attempting to give the substance of the pleadings in the court below, but that the claims of the respective parties hereto may be fully set forth, said pleadings are herewith given at length, the petition of plaintiff filed in said court being as follows:

"Plaintiff says that he is nineteen years of age and brings this action by his next friend. He says that the Erie Railroad Company is a corporation and, as such, it operates a railroad, with its

tracks, cars, engines and other equipments, in the state of Ohio and, at the time of the committing of the grievances hereinafter set forth, operated said railroad within and through the county of Richland in said state That, on the 5th day of January, 1912, and for a period of about six weeks prior thereto, the plaintiff was in the employ of the defendant wherever directed by the section foreman and on a section, extending from Pavonia, in said County, westward and a distance of about five or six miles.

"Plaintiff says that at some time the day before, or at such times as it was convenient to do so, the section foreman, under whom the plaintiff worked, would direct the men, including plaintiff, where to work the next day and at what point on the line of the section they were to come to work or to be carried to the place where work was to be done on the track; that just prior to the time plaintiff received the injuries hereinafter set forth he was directed by the foreman to come from the place where he boarded to a point about a quarter of a mile north or east of a tower located on this section as defendant's track upon which he was employed as aforesaid; that in obedience to said directions he walked to the defendant's track from his boarding place and started east on the track to go to the place as directed by the foreman and there to work in the morning on the said 5th day of January.

Plaintiff says that at the place where he recevied his in-
26 juries the defendant's road is a double track and for a long distance north and south there is a double track; that the north track is used for trains going west and the south track used for trains going east; that just before plaintiff started east on the track to go to the place where he was to work a west bound freight train passed on the north track and plaintiff walked east on the east bound track and when he had walked a short distance an east bound passenger train came down the track on which he was walking and to get out of its way he stepped over onto the west bound track and was struck and run over by an engine in charge of an engineer of the defendant which engine was running backward and in the opposite direction from the direction trains run on said track.

Plaintiff says that the engineer on said engine had under his control and direction a fireman and other employees of defendant's company were on said engine at the time plaintiff was struck and run over and he had the control and direction of the engine and men at the time.

Plaintiff says that said engine was running in the same direction as the passenger train on the east bound track and running on the track parallel to the track upon which said passenger train was running and as near as plaintiff knows the said engine was running along side the passenger train or so near its rear that plaintiff was struck before he had time to step off the track

Plaintiff says that the smoke and steam of the passenger train obscured his vision in the direction from which said engine approached so that he did not and could not see it and he could not hear it for the noise and that he believed at the time that no train or engine could approach from the direction the engine approached

and that if said engine had helped the said freight train up the grade it had been the custom to push the other train to the top of the grade which was about two miles from where plaintiff was struck and if such custom had been followed the engine could not have been at the place where Plaintiff was struck.

Plaintiff says that said engine approached the point where he was struck at a high rate of speed, towit: about forty miles an hour running along side the passenger train or at its rear end obscured from vision by the smoke and steam of the train without any signals by bell or whistle to give notice that it was running parallel with the passenger train in a direction opposite to the direction of trains on this track and he avers that the engineer and other employees on the engine knew that the men *and* employed on the section including the plaintiff would, at this time, be going to their work on and over the tracks of defendant and they knew plaintiff was on the track and that running an engine along side a rapidly moving passenger train in the direction it was going without signal by bell or whistle would endanger the lives and limbs of the section men going to their work and that it was gross negligence to run an engine upon the west bound track in the opposite direction and along side or so near another train running in the same direction and plaintiff says that it was by the gross negligence of the defendant's servants and agents in the particulars alleged and while he was exercising due diligence for his own safety in looking and listening for a train or engine and without any fault on his part he was run over by said engine and injured as hereinafter alleged and defendant was negligent in not providing rules and regulations requiring notice or signals in such case, and in not instructing plaintiff as to the dangers of this situation.

Plaintiff says that he was struck by said engine and the engine passed over him; that he received the following injuries, viz: his right hip bone broken, his right leg broken below the knee, his left leg broken, his left arm broken, the fingers
27 of his right hand injured and the index finger and the third finger had their ends cut off, a wound five inches in extent in his head, his left shoulder blade broken and his right collar bone broken. He says that he was confined to a bed in the hospital ten weeks, that he suffered agony and pain both mental and physical and that he is crippled so that he will never be able to do any labor. He says that his right leg hangs loose and that he had no control over it and that he will be compelled to use crutches throughout his life. He says that he has been otherwise injured by being run over and that his life has been shortened and that he will be compelled to suffer pain all his life.

Wherefore he prays judgment for $35,000.

After said petition was filed, it being made to appear upon application to said Court that the said Byron Marietta had attained the age of majority since the commencement of said action, the same was ordered to proceed in the name of said Byron Marietta as plaintiff, after which the defendant filed its amended answer to said petition as follows:

"The Erie Railroad Company, defendant, for amended answer herein says: It admits that at the commencement of this action plaintiff was under the age of 21 years, but for want of knowledge denies that he is now under that age.

It admits that it is and at all times in the petition mentioned was, a corporation operating a railroad extending through Richland County, Ohio, with the tracks, cars, engines and equipment thereof.

It admits that for a period of six weeks next prior to January 5, 1912, plaintiff was in its employ as a section man, on a section extending from Pavonia westerly for some distance.

It admits that before the hours of work on the morning of January 5, 1912, he was struck by an engine operated by its engineer and backing eastward on the so-called west bound track of the said railroad (there being then on said engine others of its employees, including a fireman subject to orders of such engineer).

It admits that Plaintiff thereby received certain injuries, but for want of knowledge denies plaintiff's allegations as to their nature, extent, and effect.

It further says that if there was any negligence on its part in the premises (which it denies), plaintiff's own lack of due and reasonable care in the premises proximately contributed to such injuries, in going to and being at the point where he was struck, although he knew or by the exercise of due and reasonable care on his part would have known, of the risk involved, and omitted to exercise due and reasonable care for his own safety.

It further says that said railroad extends from Ohio into other states of the United States of America, and at all times in the petition mentioned it conducted over said railroad, and each part thereof, commerce between Ohio and such other states, as a common carrier by railroad; that all Plaintiff's duties in its employ were in the maintenance of said railroad, its tracks and roadbed, in suitable condition for use in such interstate commerce; and that if plaintiff's being on defendant's premises at the time of his being so injured, was because of his being in its employ (which it denies) or by virtue of any direction, permission or license given him as its employee (which it also denies) plaintiff can maintain no action against defendant for such injuries, not brought by virtue of the Act of the Congress of the United States, approved April 22, 1908, and entitled "An act relating to the liability of common carriers by
28 by railroad as to the employees in certain cases," whereas this action is not so brought."

By reply the Plaintiff says:

"That on or about January 1914, and since the filing of the petition, he arrived at full age and for reply to the amended answer of defendant, says that he denies each and every allegation of said amended answer, and he asks that the case proceed in his own name and right."

With the issues thus made by the pleadings the case was submitted to a jury, under the instructions of the trial court, resulting in a verdict for the plaintiff. Upon a motion for a new trial being overruled judgment was entered on said verdict, and a petition in error

with a bill of exceptions was filed in this court for the review of said judgment.

In said petition in error some fifteen separate grounds of error are assigned in support of the contention of the plaintiff in error that said judgment should be reversed, but we will notice only such as we deem necessary to a proper disposition of the case.

It is apparent from the pleadings and the evidence herein that a recovery was sought and obtained against the railroad company upon the ground of negligence, and it is also apparent that such negligence was the alleged careless and negligent operation of one of its engines on the tracks of said company resulting in the injuries to the Plaintiff complained of. The first inquiry arises, then, was the railroad company, through its agents and servants, guilty of negligence? The evidence contained in the bill of exceptions shows that the plaintiff was employed by said company as a section man for some four weeks immediately preceding the day he received his said injuries. That he was subject to the orders and directions of a foreman of said company as to the location of his daily work on a certain section of said company's road. That he
29 lived with his uncle whose residence was a few rods south of said railroad tracks and about one quarter of a mile distant from the place where the Plaintiff was injured, where there were two tracks of said company the trains running eastwardly on the south track and the trains running westwardly on the north track. That on the section where the Plaintiff was working was a tower situated about a mile from the Pavonia station on said road. At the time of his employment by said company, the plaintiff testified that he was directed by said foreman to report for duty at 7 A. M. daily, and to come down the track to reach his place of work. That on the evening preceding the morning of his injury, he testified that he was instructed by said foreman to be at said tower for work, which the foreman denies and to this end he left his uncle's house at 6:40 on the morning in question, walked down a private road leading from his Uncle's residence to said company's tracks, and then proceeded on the north track toward the tower, as he had always done theretofore. That as he passed his uncle's barn before reaching the said company's tracks, he saw a freight train pass westwardly on the north tracks with an engine attached to the rear thereof, helping said train over the hill. He further testified that the use of said company's tracks was the only way of getting to said tower from where he lived, that the sides of said tracks were filled with slag and stone that a net work of wires resting on blocks elevated some inches above the surface of the ground were strung along the side of said tracks thus rendering it impassable for one to walk along the side thereof, that there was no foot path at the side or between said tracks, that the use of said tracks was the only way afforded section men employed on said road, who lived near where the plaintiff lived, to reach their place of work on said section in the neighborhood of said tower, and that such section men, not unlike himself daily used said track or tracks for that purpose. It appears that a

daily used said track or tracks for that purpose. It appears that as he was walking down said south track towards said tower to commence work, a passenger train running eastwardly on said south track came along when he stepped from said south track over on to the north track where he was suddenly struck and run over by an engine in charge of the engineer of said company, which engine was running backwardly and eastwardly at a high and dangerous rate of speed without in any wise giving notice to persons of its so running backwardly and eastwardly, and without giving any signal whatever of its approach. It further appears that as said passenger train bound for the east passed the plaintiff, it emitted a large volume of steam which enveloped him and obscured his vision just as he was struck and run over by said backing engine. Other witnesses also testified that it was the habit of section men working on said railroad, going to work thereon in the direction of said tower to use the tracks of said company as a way of travel thereto and that they had been so using said tracks for many years, and the foreman of said railroad company, on page 153, testified he knew that the section men came down the track in the morning and returned thereon in the evening. The same witnesses also testified that they lived near to said company's tracks and that they saw said freight train go west and said passenger train go east on the morning in question, and that they also saw said engine running backwardly and eastwardly at a high rate of speed running along with said passenger train and at about the same rate of speed, which some of the witnesses estimated to be forty miles per hour. This, however, is denied by the engineer and other employees in charge of said engine. That the plaintiff was struck and injured by said engine as claimed by him, is fully borne out by the record in this case, and we think that it satisfactorily appears, also, that the engine in question was backing eastwardly on the north track at a dangerous rate of speed without the engineer or fireman or brakeman keeping a proper lookout for, or having some other person on the east end of the tender attached to said engine to keep a lookout for persons liable to be on the tracks of said company, especially at an hour in the morning when it could reasonably be anticipated that section men and others in the employ of said company would be using said tracks as a way of travel to their work on the section near to where said engine struck and injured the Plaintiff. We think that ordinary care required this to be done. Again, not only was the presence of section men on said tracks to be reasonably anticipated at said time, but such use of said tracks having been made for many years immediately before that time, with the knowledge of the foreman of said company, we think such knowledge would be imputable to said company, including the engineer on said engine. If such was and had been the uniform custom of section-men for the time testified to by witnesses, the company was thereby chargeable with notice of such use of its tracks, and if it was, then said company owed to said employees a higher degree of care than mere licensees on its tracks.

The credibility of the witnesses testifying to the speed of the engine at the time that the plaintiff was injured, running as it was on the track in an opposite direction, giving no signal of its approach, was for the jury to consider and determine in connection with the further uncontradicted fact that the tender attached to said engine running backwardly had no watchman on it, and that neither the engineer, the fireman nor the brakeman saw the defendant in error on said tracks, or either of them, these were questions of fact to be solved by the jury, including the care exercised by the defendant in error, under the instructions of the Court below, and the jury having evidently found that the engineer in charge of said engine was negligent in its operation under the circumstances, we are not disposed to take issue with such finding.

But while said company may have been negligent, was the defendant in error guilty of such contributory negligence in the premises as to defeat the latter's right to recover? Such is the
32 defense made in the amended answer of said company.

Without discussing the relative rights of the company and the public in reference to the exclusive use of its tracks by the former in the operation of its tracks and the conduct of its business, it may be remarked that such use may be qualified at times by the relation of its employees. But it has been held by our Supreme Court in the 50th O. S. 136, that persons disconnected with the railroad may, under certain circumstances walk upon the tracks of a railroad without being chargeable with negligence. Generally, whoever goes upon its tracks without invitation or license, assumes the incidental perils. In the case at bar, as we view it, the defendant in error was not a trespasser upon the company's tracks but he was rightfully there by reason of his employment by said company and in obedience to orders given by his foreman which ought to have insured him protection from the negligence of the company. The relation of master and servant then existed and the obligations of that relation could only be forfeited by some act of negligence upon the part of the defendant in error. Counsel for Plaintiff in error argue that it was negligence on his part and that he failed to exercise ordinary care for his own safety in stepping from the south over on to the north track to avoid the passing train eastward bound. True, if there had been any other safe place for him to have taken it was his duty to have done so, but was he guilty of contributory negligence in doing what he did do, with no safe place between said tracks for him to take and with the sides of said tracks filled with stone and slag, as claimed by him, and in the reasonable expectation that no train or engine would be running on the north track in an opposite direction to what trains usually run on said track? Under these circumstances, did his conduct show a want of due care on his part and did it constitute contributory negligence? Applying the rules of law stated in the case of

The L. S. & M. S. R. R. Co. vs. Louisa Schultz, Admrx.
33 19th C. C. 639, and other cases that might be cited, we think that the jury, under the evidence in the case, were justified in finding that the defendant in error showed no such lack

of due and reasonable care that proximately contributed to his injuries.

The extent of the injuries received by the defendant in error we do not feel called upon to discuss except to add that in the light of the evidence such injuries, or at least some of them, are permanent thereby rendering the defendant in error a cripple for life.

Of the other defense, namely, that plaintiff can maintain no action against the defendant for the injuries complained of because not brought by virtue of the Act of Congress of the United States, approved April 22, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" and therefore improperly brought, we do not see how the provisions of said Act apply to the case at bar. The question is here not what kind of traffic or commerce the railroad company was engaged in, but what was the defendant in error engaged in at the time he received his injuries. Both plaintiff and defendant on the trial of said case below appear to have agreed that the Plaintiff below at the time was a section man, nothing more and nothing less, and the evidence in the bill of exceptions so shows. The mere fact that the railroad company was operating cars between certain points within and without this State, may be evidence of said company being engaged in interstate commerce, but that fact does not exclude the hypothesis of intra-state employment. The duties of the railroad employees may cover both inter state and intra state employment. Here it is conceded that the defendant in error had been engaged as a section man in assisting to lay or repair tracks. Surely it will scarcely be claimed that cars engaged in inter-state commerce running over such tracks would bring such section man within the provisions of said act, if then engaged in such service. We apprehend the test is, What was the party engaged in at the very time of the injury?

34

In the case referred to by counsel, Erie R. R. vs. Welch, reported in a late edition of the Law Reporter, Judge Donahue, speaking for the Court says:

"In this case, however, it does not appear that there is any conflict of evidence, at least no material conflict. If we are correct in the proposition that the presumption obtains that the law of the forum applies to the transaction then it is necessary in order to overcome this presumption to show that the plaintiff at the time of the injury was actually employed in moving or handling cars engaged in inter state traffic. Notwithstanding his employment may have been entirely local and wholly within the state, yet, if in the course of his service it became his duty to handle or assist in handling cars engaged in interstate commerce, either by taking them out of or putting them into trains, or shifting them about the various parts of the railway yards, while so actually engaged in this service he must be held to have been engaged in inter-state commerce and the federal laws upon that subject would apply to any transaction occurring while he was actually so employed. There is some evidence in this record that shortly before his injury he was assisting in shifting a car containing inter-state traffic enroute to

Meadville, Pa., but it also appears that after service had been performed he had handled a caboose * * * and there is no evidence whatever tending to show that this caboose was engaged in interstate commerce. There is also some evidence tending to show that the next service he would be required to perform would be in relation to cars engaged in interstate commerce but what he had been doing before the time of the accident or what he might have done shortly thereafter, if the accident had not happened, is not very important in determining this question. The important inquiry is as to what he was doing at the time the accident occurred, and it appears without dispute in this record that he had finished the duties required of him by prior orders of the master, and was at the time of the injury proceeding to the master's office for further orders and direction as to his service, so that he was not then and there employed in moving or handling cars engaged in interstate commerce."

"The facts of this case having wholly failed to show the Plaintiff was engaged in inter state commerce at the time of the accident and injury, the law of the forum applies and the trial Court properly gave its charge to the jury the law of this state."

Again, Doherty on Liability of Railroads to Inter-state Employees on page 97 says:

"By the terms of the Act 'any employee while engaged in the inter-state commerce' is included in the Act, the protection of the Act thus given only while the employee is engaged in inter-state commerce. "According to the interpretation already given by the Courts, general service in the performance of duty relating to inter-state commerce is not sufficient. The particular service in which an employee is engaged at the time of injury must have direct relation to the inter-state traffic in which the railroad is engaged. Thus, an engineer of a train purely local, (that is a train which at the time is engaged in the transportation of no inter-state freight, passenger or inter-state express matter) is not entitled to a
35 remedy under the provisions of this Act.

"In other words, all who are at the time of the injury engaged in duty which has directed relation to inter-state business of the carrier are entitled to the protection of the Act."

Applying the rule laid down by the Supreme Court of Ohio, it is the act or service in which the injured party is engaged at the time of the injury that controls, and under the undisputed evidence in this case we hold that the provisions of the Act referred to do not apply and that the several requests of the plaintiff in error in relation thereto were properly refused to be given to the jury by the Court below.

Following the thought expressed in the foregoing views, the several exceptions saved to the charge of the Court and to the refusal of the Court to charge as requested will be overruled.

It is alleged that the Court below erred in the admission and rejection of evidence offered upon the trial. An examination of the record shows that some minor errors occurred in this respect, but we do not regard them as prejudicially erroneous.

We hardly deem it necessary to further discuss the exceptions saved to the verdict of the jury being against the weight of the evidence and the judgment rendered being contrary to law.

We have given no little time and attention to an examination of the evidence in this case and we are satisfied that the jury were fully warranted in returning a verdict for the plaintiff below, and that said verdict is not clearly against the weight of the evidence nor contrary to law. The verdict is a substantial one, it is true, but the nature and extent of the injuries of the defendant in error were before the jury and they determined the compensation he was fairly and justly entitled to. In the absence of a showing made that the jury was influenced by passion or prejudice, or some other improper influence, the policy of reviewing courts is not to interfere with their finding.

14th Ohio, 418-427.
19th C. C. 639-647.

The case appears to have been fairly tried and after considering it at length we are satisfied that the verdict and judgment justly represent the award of substantial justice between the parties hereto. The judgment of the Court of Common Pleas will therefore be affirmed at the costs of the Plaintiff in Error. Exceptions.

[Endorsed:] 52. Erie R. R. Co. vs. Marrietta. Opinion.

36 THE STATE OF OHIO,
Richland County, ss:

I, J. V. Finney, Clerk of the Common Pleas Court, and the Court of Appeals, within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the Opinion of the Court of Appeals in the case of the Erie Railroad Company vs. Byron Marietta, filed in my office on the 13" day of February 1915.

In testimony whereof, I have hereunto subscribed my name officially, and affixed the Seal of said Court, at the Court House in Mansfield, in said County, this 12" day of July, A. D. 1915.

[Seal Common Pleas Court, the County of Richland, Ohio.]

J. V. FINNEY, *Clerk.*

37 In the Supreme Court of the State of Ohio.

No. 14846.

ERIE RAILROAD COMPANY, Plaintiff in Error,
v.
BYRON B. MARIETTA, Defendant in Error.

Motion to Require the Court of Appeals of Richland County, Ohio, to Certify Its Record.

Now comes the plaintiff in error and asks this Court to require the court of appeals of Richland County, Ohio to certify its record to this court in the case of Erie Railroad Company against Byron B. Marietta for the following reasons, towit:

First. The matter involved therein is of general public interest.

Second. The law governing the rights of the parties in this case is — an unsettled condition so far as the courts of appeals are concerned and has never been passed on by the Supreme Court in this state.

Third. There is a federal question involved in the case.

Fourth. Under the federal question the rights of the parties are to be worked out by the Federal law and not by the state law as was done in this case.

McBRIDE & WOLFE,
Attorneys for Plaintiff in Error.

38 STATE OF OHIO,
City of Columbus:

In the Supreme Court of the State of Ohio, January Term, A. D. 1915.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Certificate.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the Motion to require the Court of Appeals of Richland County, to certify its record in the foregoing cause, in the Supreme Court of Ohio.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court, this 15th day of July, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk,*
By CLINTON COLLINS, *Deputy.*

39 [Endorsed:] No. 14846. In the Supreme Court of Ohio. Erie Railroad Company, Plaintiff in Error, v. Byron B. Marietta, Defendant in Error. Motion to require the Court of Appeals of Richland County, to certify its record. McBride & Wolfe, Attorneys for Plaintiff in Error. Filed Court of Appeals Jul- 19, 1915. Richland County, Ohio. J. V. Finney, Clerk.

40 *Motion.*

STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1915, To wit, Tuesday, March 16th.

No. 8729.

ERIE RAILROAD COMPANY
vs.
BYRON B. MARIETTA.

Motion for an Order Directing the Court of Appeals of Richland County to Certify Its Record.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 27 Page 60.

In Witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 14th day of July A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk,*
By CLINTON COLLINS, *Deputy.*

41 [Endorsed:] Supreme Court of the State of Ohio. No. 8729. Erie Railroad Company vs. Byron B. Marietta. Certified Copy of entry overruling motion. Filed. Court of Appeals Jul- 19, 1915. Richland County, Ohio. J. V. Finney, Clerk.

42 In the Supreme Court of the State of Ohio.

No. 14846.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Petition in Error.

Plaintiff in error says that this cause involves questions arising under the constitution of the United States as hereinafter appears and therefore comes within the provisions of the constitution of the State of Ohio permiting this pet-tion in error to be filed. And it says that at the January term, 1915, of the Court of Appeals of Richland County, Ohio, and by the consideration of said court, the defendant in error recovered a judgment against the plaintiff in error in a suit therein pending wherein plaintiff in error was plaintiff in error and defendant in error was defendant in error.

A certified copy of said judgment and the record and proceedings of said court together with the original papers and bill of exceptions are filed herewith and the plaintiff in error avers that there is manifest error in said judgment to the prejudice of the plaintiff in error in the following particulars, towit:

First. The court of appeals erred in affirming the judgment of the court of common pleas.

Second. The question involved in this cause involves that part of the constitution of the United States relating to interstate commerce.

Third. The courts of the State of Ohio have no jurisdiction to hear or determine the questions involved in this cause but the
43 same are cognizable only by the courts of the United States.

Fourth. There was an issue of fact joined by the pleadings in this cause involving the provision of the Fereral Employers' Liability Act of 1908 and the court of common pleas refused to give in charge to the jury the provisions of the Federal Employers' Liability Act of 1908 but instructed the jury in accordance with the law of the State and said act and charge of the court of common pleas was affirmed by the court of appeals.

Fifth. The court of appeals erred in refusing to reverse the judgment of the court of common pleas.

McBRIDE AND WOLFE,
Attorneys for Plaintiff in Error.

44 STATE OF OHIO,
City of Columbus:

In the Supreme Court of the State of Ohio, January Term, A. D. 1915.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Certificate.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the Petition in Error filed in the foregoing cause, in the Supreme Court of the State of Ohio.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court, this 15th day of July, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk,*
By CLINTON COLLINS, *Deputy.*

45 [Endorsed:] No. 14846. In Supreme Court of Ohio. Erie Railroad Company, Plaintiff in Error, vs. Byron B. Marietta, Defendant in Error. Petition in Error. McBride & Wolfe, Attorneys for Plaintiff in Error. Filed. Court of Appeals Jul- 19, 1915. Richland County, Ohio. J. V. Finney, Clerk.

46 In the Supreme Court of the State of Ohio.

No. 14846.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Motion.

The defendant in error moves the court for an order striking from the files of this court the petition in error filed by the plaintiff in error, Erie Railroad Company, for the following reasons, to-wit:

First. Because there is no question in the case arising under the constitution of the United States.

Second. The Supreme Court of Ohio in this case, in deciding and overruling a motion to certify the records of the court of appeals of Richland County, held that plaintiff in error had no right to file a petition in error in this case.

Third. The case was tried in the common pleas court upon defenses made by defendant below under the laws of Ohio, and there was no request or requests by the defendant below to charge the jury upon questions of law arising under the constitution of the United States or the Federal Employers' Liability Act, or to submit to the jury questions of fact under said act.

W. S. KERR,
Attorney for Defendant in Error.

47 STATE OF OHIO,
City of Columbus:

In the Supreme Court of the State of Ohio, January Term, A. D. 1915.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Certificate.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the Motion to Strike Petition in Error from the files in the foregoing cause, in the Supreme Court of Ohio.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court, this 15th day of July, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk,*
By CLINTON COLLINS, *Deputy.*

48 [Endorsed:] No. 14846. In the Supreme Court of Ohio. Erie Railroad Company, Plaintiff in Error. vs. Byron B. Marietta, Defendant in Error. Motion to strike petition in error from the files. W. S. Kerr, Attorney for Defendant in Error. Court of Appeals, Richland County, Ohio. Filed Jul- 19, 1915. J. V. Finney, Clerk.

49 *Motion.*

STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1915, to wit, Tuesday, May 11th.

No. 8767.

ERIE RAILROAD COMPANY
vs.
BYRON B. MARIETTA.

Motion by Defendant to Strike Petition in Error from the Files in Cause No. 14846, *on the General Docket.*

It is ordered by the Court that this motion be, and the same hereby is, sustained; and that the petition in error in this cause be, and the same hereby is, dismissed.

It is further ordered that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 27, Page —.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 14th day of July A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk,*
By CLINTON COLLINS, *Deputy.*

50 [Endorsed:] Supreme Court of the State of Ohio. No. 8767. Erie Railroad Company vs. Byron B. Marietta. Certified Copy of entry sustaining motion to strike petition in error from files. Filed Court of Appeals, Jul. 19, 1915. Richland County, Ohio. J. V. Finney, Clerk.

51 *Transcript of Docket and Journal Entries to Supreme Court of the United States.*

General Code, Secs. 12263 to '65.

Court of Appeals of Richland County, Ohio.

No. 52. Error.

ERIE RAILROAD Co., Plaintiff,
vs.
BYRON MARIETTA, Defendant.

Appearance to September Term, 1914.

No. 52.

ERIE RAILROAD COMPANY
vs.
BYRON B. MARIETTA.

McBride & Wolfe.
W. S. Kerr.

Oct. 10/14, Petition in Error and Waiver of Service filed.
Oct. 10/14, Original papers (15) and Transcript of Appearance Docket and Journal Entries from Common Pleas Court and Bill of Exceptions filed.
Dec. 14/14, Briefs (3 copies) of Pl'ff in Error filed.
Dec. 14/14, Acknowledgment of Service (Def't) filed.
Dec. 23/14, Briefs (3) of Def't in Error filed and Proof of Service filed.
Dec. 18/14, Motion, Def't in Error to advance cause filed.
September Term, 1914, Con. J. 1/72.
Jan. Term 1915, Judgment of Common Pleas Court affirmed, without penalty, Exceptions, Cause remanded for execution, J. 1/83.
Mandate issued Jan. 25/15.
Feb. 13/15, Opinion filed.
March 24/15, Certified copy of Journal Entry from Supreme Court received and filed, J. 1/88.
July 10/15, Petition for allowance Writ of error filed.
July 10/15, Assignment of Errors on writ of Error filed.
July 10/15, Order allowing Writ of Error filed.
July 10/15, Citation filed. July 10/15, Citation filed.
July 10/15, Citation and Affidavit filed.
July 10/15, Bond on Writ of Error filed.
July 19/15, Certified Copy of Motion to require the Court of Appeals of Richland County., O. to certify its records filed.
July 19/15, Certified Copy of entry overruling motion, filed.
July 19/15, Certified Copy of Petition in error, filed.

July 19/15, Certified copy of Motion to strike Petition in error from the files, filed.

July 19/15, Certified copy of entry sustaining motion to strike Petition in Error from files, filed.

July 19/15, Certificate of E. O. Randall, Supreme Court Reporter, filed.

July 30/15, Statement of Errors, etc. filed.

52 September Term, Richland County Court of Appeals, January 5", 1915.

#52.

ERIE RAILROAD CO.
vs.
BYRON MARIETTA.

This cause continued.

16" Day, January Term, Richland County Court of Appeals, January 22", 1915.

#52.

ERIE RAILROAD CO.
vs.
BYRON MARIETTA.

This cause came on for hearing upon the petition in error, the transcript, and the original papers and pleadings from the court of common pleas of Richland County, and was argued by counsel; on consideration whereof the Court find there is no error apparent on the record in said proceedings and judgment. It is therefore considered by the Court that the judgment aforesaid be, and the same hereby is, affirmed; and that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—; and the court being of opinion that there was reasonable ground for proceedings in error, allow no penalty. To all of which findings plaintiff in error at the time excepted. It is further ordered that a special mandate be sent to the Court of Common Pleas of Richland County, for execution upon this judgment.

January Term, Richland County Court of Appeals, March 24", 1915.

#52.

ERIE RAILROAD CO.
vs.
BYRON B. MARIETTA.

STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1915, to wit, Tuesday March 16", 1915.

ERIE RAILROAD COMPANY
vs.
BYRON B. MARIETTA.

Motion for an Order Directing the Court of Appeals of Richland County to Certify its Record.

It is ordered by the Court that this Motion be, and the same hereby is, overruled.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, towit: from Journal No. 27, page 60.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 23rd day of March, A. D. 1915.

FRANK E. McKEAN, *Clerk,*
By SEBOTT MILLER, *Deputy.*

53 THE STATE OF OHIO,
Richland County:

I the undersigned, Clerk of the Court of Appeals, in and for said County, do hereby certify that the foregoing is a true transcript of the Docket and Journal Entries of said Court in the above entitled cause, and that the said Erie Railroad Company entered into a written undertaking with approved surety, conditioned to abide and perform the order and judgment of the Supreme Court, and to pay all moneys, costs and damages which may be required of or awarded against said Byron Marietta by said Supreme Court; and I further certify that the papers herewith sent, numbered from one up to —, are all the original papers and pleadings filed in the above cause of Erie Railroad Company, Plaintiff, against Byron Marietta Defendant.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Court of Appeals on this 30 day of July A. D. 1915.

[Seal Court of Appeals, Richland County, Ohio.]

J. V. FINNEY, *Clerk,*
By ——— ———, *Deputy.*

[Endorsed:] No. 52. Doc. 1. Page 52. Court of Appeals, Richland County, O. Erie Railroad Company, Plaintiff, vs. Byron Marietta, Defendant. McBride & Wolfe, Plaintiff's Attorney. W. S. Kerr, Defendant's Attorney. Transcript of Docket and Journal Entries.

54 STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1915.

I, E. O. Randall, Reporter of the Supreme Court of Ohio, do hereby certify that no opinion accompanied the decision of the Supreme Court of Ohio, in Case No. 8729 on the Motion Docket, which motion to certify the record of the Court of Appeals of Richland County, Ohio, in the case of Erie Railroad Co. vs. Byron B. Marietta, was overruled by this Court March 16, 1915.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 15th day of July, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

E. O. RANDALL, *Reporter.*

STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1915.

I, E. O. Randall, Reporter of the Supreme Court of Ohio, do hereby certify that no opinion accompanied the decision of the Supreme Court of Ohio, in case No. 8767 on the Motion Docket, which motion by defendant to strike the petition in error from the files in Cause No. 14846 on the General Docket was sustained by this Court May 10, 1915; said Cause No. 14846 being entitled: Erie Railroad Co. vs. Byron B. Marietta.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 15th day of July, 1915.

[Seal the Supreme Court of the State of Ohio.]

E. O. RANDALL, *Reporter.*

55–59 [Endorsed:] In Supreme Court of Ohio. Erit Railroad Company, Pl'ff in Error, vs. Bryon B. Marietta, D'f't in Error. Centificate of E. O. Randall, Supreme Court Reporter. Court of Appeals, Richland County, Ohio. Filed Jul- 19, 1915. J. V. Finney, Clerk.

60 In the Court of Appeals of Richland County, O.

ERIE RAILROAD CO., Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Petition of Plaintiff in Error for Allowance of Writ of Error from the Supreme Court of the United States to the Court of Appeals of Richland County, State of Ohio.

To the Honorable Robert S. Shields, Presiding Judge of the Court of Appeals of Richland County, State of Ohio:

This petition of the Erie Railroad Company respectfully shows as follows:

On the 27th day of July, 1912, this case was filed in the Court of Common Pleas of Richland County, Ohio, Defendant in Error herein being Plaintiff and the Plaintiff in Error herein being defendant.

The Plaintiff's petition in said case prayed $35,000.00 damages for personal injuries alleged to have been sustained by the Plaintiff whilst in the employ of the defendant as a track man as a result of the alleged negligence of the defendant in detaching an engine from a train running on the northwardly track and using it as a pusher to help a freight train that was stalled up over the grade and detaching said engine as a pusher and causing it to
61 run backward at a rapid rate along side a rapidly moving passenger train on another track immediately to the south of said north bound track, and for the purpose of attaching said engine again to the train from which it was detached and in backing said engine at a high rate of speed and without giving any warning by bell or whistle.

Plaintiff at the time of receiving said injury was walking to the eastward on said track with his back to the engine approaching him from the west going to the place where he was to begin his work on that day for said Erie R. R. Company.

To this petition the Defendant, Erie Railroad Company, filed an answer of general denial and averring further that the Plaintiff was guilty of negligence contributing to his alleged injuries in that in going to and being at the point where he was struck, he knew or by the exercise of due and reasonable care on his part would have known of the risk involved and omitted to exercise due and reasonable care for his own safety. And said Erie Railroad Company further averred in said answer that said railroad extends from Ohio

into other states of the United States of America and at all times in the petition mentioned, it conducted over said railroad and each part thereof, commerce between Ohio and such other states, as a common carrier by railroad; that all Plaintiff's duties in its employ were in the maintenance of said railroad, its tracks and road bed in suitable condition for use in such interstate commerce; and that if Plaintiff's being on defendant's premises at the time of his being so injured, was because of his being in its employ (which it denies) or by virtue of any direction, permission or license, given him as its employee (which it also denies) plaintiff can maintain no
62 action against defendant for such injuries not brought by virtue of the Act of the Congress of the United States approved April 22, 1908, and entitled "An Act Relating to the Liability of the Common Carriers by Railroad to their Employees in certain Cases," whereas this action is not so brought.

To this answer the Plaintiff filed a reply denying not only contributory negligence but every allegation contained in the answer.

At the third trial of said case in said Court of Common Pleas evidence was admitted showing that the defendant, Erie Railroad Company was at the time of the occurrence complained of in the Plaintiff's petition, a common carrier by railroad, engaged in interstate commerce between the several states and that the Plaintiff at the time he received his injury, was employed by the Defendant in such commerce, it appearing that he was going to a point on the track where his work was to begin on that day and that the train from which the engine that ran over him was detached and to which it was backing back to be attached contained a great number of cars consigned from point in one state to point in another state and loaded with shipments consigned from a point in one state to a point in a different state. This proof was not contradicted. It also appeared from the evidence without contradiction that the Plaintiff had been in the employ of the defendant for a period of six weeks next prior to the date of the accident. At the close of the testimony of the Plaintiff, the defendant moved the Court for a peremptory instruction to the jury for a verdict in its favor but the Court overruled the same to which an exception was preserved and at
63 the close of all of the evidence given by either party. The defendant again moved the Court for peremptory instruction to the jury for a verdict in its favor. Upon the theory that the relations between the Plaintiff and the defendant were governed by the Act of Congress approved April 22, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," that that act permitted to the defendant the defense of assumed risk in this case and that if as the uncontroverted evidence of the plaintiff established his knowledge of the condition of the track of which he complained and which he charged as negligence against the defendant, the Plaintiff must as a matter of law, be held to have assumed the risks of that condition and be denied a recovery. This motion was overruled by the trial Court and exceptions taken.

Thereupon the Defendant requested the Court in writing to gi
the jury in his charge amongst other instructions the following:—
"If the Plaintiff, for his own convenience, voluntarily went alon
the tracks of the railroad and this railroad was being at the tim
used and operated as a highway of Interstate Commerce, he as
sumed the risk and danger of so using the tracks." But the Cou
refused so to charge the jury and the defendant then excepted. An
the Defendant further requests in writing the Court to give to th
jury in his charge the following to wit:—
"If the Plaintiff, in getting off the track upon which he saw
train approaching, could with safety and reasonable convenienc
have stepped to the right or south of said track, and of his own
choice stepped on to a parallel track, and was struck by
64 train on said parallel track, he assumed the risk of such
choice."
But the Court refused to charge this request and the defendant
the time excepted.
The Defendant duly preserved its exceptions to the charge of th
Court as a whole and in several particulars therein specified, and t
the refusal to give to the jury the third defense of the answer o
Pl'ff in Error, being charged as aforesaid, the jury rendered a ver
dict of $12,000.00 in favor of the Plaintiff.
A proper motion for a new trial was filed by the defendant an
overruled, judgment being entered for the Plaintiff in the sum o
$12,000. To this judgment, the defendant thereafter filed a peti
tion in Error in the Court of Appeals of Richland County, Ohio, i
which Petition in Error amongst other things the defendant com
plained of error of the Court in charging the jury and of the erro
of the Court in refusing to give to the jury, the instructions re
quested by the defendant as hereinbefore set forth, and of Cour
in refusing to direct verdict in its favor. Said cause came on to b
heard in the said Court of Appeals of Richland County, Ohio, an
was argued by counsel at the January Term, 1915, and on the 25th
day of January, 1915, said Court filed its opinion in which i
affirmed the judgment of the Court of Common Pleas. To thi
judgment the Defendant filed a motion in the Supreme Court o
the State of Ohio asking that Court to require the Court of Appeal
of Richland County, Ohio, to certify its record to said Court on th
ground as stated in the motion that it involved a question of public
or general interest but the Supreme Court of the State of Ohio
on March 16, 1915, overruled said motion and refused to require
said Court of Appeals to certify up its record. Thereupon the de
fendant filed its petition in error in the Supreme Court of Ohi
stating and claiming the right to file the same by reason of the fac
that it involved questions arising under the Constitution o
65 the United States to which Petition in Error the Defendan
in Error, Byron B. Marietta filed a motion asking that th
Petition in Error be stricken from the files. Upon a hearing ha
this motion was on the 12th day of May, 1915, sustained and th
Petition in Error ordered stricken from the files by the Supreme
Court of the State of Ohio. By Article four, sections 1, 2, 6 of th

Constitution of the State of Ohio, it is provided among other things, that the Court of Appeals shall have final jurisdiction in all cases, unless a question of public or general interest is involved when the Supreme Court may direct any Court of Appeals to certify its record to the Supreme Court or except in cases involving questions arising under the Constitution of the United States.

Your petitioner further says that by reason of the fact that the Supreme Court of the State of Ohio refused to require this Court of Appeals of Richland County, Ohio, to certify its record to said Supreme Court of the State of Ohio and for the further reason that said Supreme Court of the State of Ohio dismissed the petition in error of this defendant, Erie Railroad Co. from its files, that therefore the judgment of the Court of Appeals of Richland County, Ohio, was and is a final judgment in the highest Court of the State of Ohio in which a decision in this action could or can be had, and that a federal question was made in said action as hereinbefore set forth, and that said judgment of this honorable Court was repugnant to and in conflict with the laws of the United States
66 and particularly the said Act of Congress of April 22, 1908 and that a decision of said Federal question was necessary to the judgment rendered.

Your petitioner further represents that notwithstanding the passage of said Act of Congress above referred to sections 6245 and 6017 of the General Code of the State of Ohio which abolishes the defense of assumed risk in the State of Ohio is still in full force in the State of Ohio and the defense of assumed risk is not available in the State of Ohio to your petitioner the Erie Railroad Company and can only be made available to it under the Act of April 22, 1908, of the Congress of the United States.

Wherefore your petitioner presents herewith an exemplified transcript of the record of your honorable Court in said cause and prays that a writ of error to the said Supreme Court of the United States be allowed; that citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the terms of statutes in such cases made and provided, said bond and writ of error may operate as a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of this, the Court of Appeals of Richland County, Ohio, may be reversed.

ERIE RAILROAD COMPANY,
By C. E. McBRIDE AND
H. M. WOLFE,
Its Attorneys.

The writ of error as prayed for in the foregoing petition
67 is hereby allowed this 9th day of July, 1915, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of $15,000.00. Dated this 9th day of July, 1915.

ROBERT S. SHIELDS,
Presiding Judge of the Court of Appeals of Richland County, Ohio.

68 [Endorsed:] 1. No. 52. Erie R. R. Co., Pl'ff in Error, vs. Byron B. Marietta, Def't in Error. Petition for allowance Writ of Error. McBride & Wolfe, Att'ys for Pl'ff in Error. Court of Appeals, Richland County, Ohio. Filed Jul- 10, 1915. J. V. Finney.

69 In the Court of Appeals of Richland County, O.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Assignment of Errors on Writ of Error from the Supreme Court of the United States.

Now comes the Plaintiff in Error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of Richland County, State of Ohio, in the above entitled matter, there is manifest error in this to wit:

First. That said Court of Appeals erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby depriving this Plaintiff in Error of rights, privileges and accommodations, secured to it by the Act of Congress of April 22, 1908, entitled "An Act Relating to the Liability of Common carriers by railroad to their Employees in Certain Cases." to wit:—in this case:—the defense that the Defendant in Error had assumed the risks of the defects complained of in his petition.

Second. The said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, whereby said Court of Appeals of Richland Count, Ohio, held that this case was governed by section 6245 and section 9017 of the General Code of the State of Ohio and not by the Act of Congress of April 22, 1908 entitled "An Act Relating to the Liability of Common Carriers by Railroads to their Employees in Certain Cases," and that the said statutes of the
70 State of Ohio were not in conflict with, and were not superseded by said Act of Congress.

Third. The said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said Court in refusing to give to the jury the following instructions requested by the Plaintiff in Error to wit:—If the Plaintiff, for his own convenience, voluntarily went along the tracks of the railroad, and this railroad was being at the time used and operated as a highway of Interstate Commerce, he assumed the risk and danger of so using the tracks." Notwithstanding that it was proved in this case without contradiction that at the time the Defendant in Error received his alleged injuries he was employed in Interstate Commerce by the Plaintiff in Error which was at the time, a common carrier by railroad engaged in Interstate Commerce.

Fourth. That the said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said Court in refusing to give the jury the following instruction requested by this defendant in error, to wit:

"If the Plaintiff, in getting off the track upon which he saw a train approaching, could with safety and reasonable convenience have stepped to the right or south of said track, and of his own choice stepped on to a parallel track, and was struck by a train on said parallel track he assumed the risk of such choice."

Notwithstanding that it was proved in this case without contradiction that the time the Defendant in Error received his
71 alleged injuries he was employed in Interstate Commerce by the Plaintiff in Error which was at the time a common carrier by railroad engaged in Interstate Commerce.

Fifth. The said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said Court in charging the jury in its general charge to the jury without giving to or submitting to said jury the assumption of risk on the part of this Defendant in Error and charging the jury generally without submitting the question of the assumption of the risk by the Defendant in Error to the jury. And in withdrawing third defence of the Answer of Plaintiff in Error from the jury and in charging them to disregard said defence thereby depriving Plaintiff in Error of the defense of assumed risk to which it excepted.

Sixth. The Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said Court in overruling the motion of the Plaintiff in Error at the close of all the evidence for the direction of a verdict in its favor, although, under the Act of Congress April 22, 1908, "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," the Plaintiff in Error by reason of uncontradicted proof showing knowledge on the part of the Defendant in Error of the conditions complained of in his petition and an assumption of the risks thereof, was, as a matter of law entitled to the direction of such a verdict.

Wherefore, the Erie Railroad Company prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught and that it may be restored to all things
72 which it has lost by the action and because of said judgment and decision.

ERIE RAILROAD COMPANY,
By C. E. McBRIDE AND
By A. M. WOLFE, *Its Attorneys.*

73 [Endorsed:] No. 52. Erie Railroad Co., Pl'ff in Error, vs. Byron B. Marietta, Def't in Error. Assignment of Errors on Writ of Error. McBride & Wolfe, Att'ys for Pl'ff in Error. Court of Appeals, Richland County, Ohio, Jul- 10, 1915. Filed, J. V. Finney, Clerk.

74 In the Court of Appeals of Richland County, O.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Order Allowing Writ of Error to the Court of Appeals of Richland County, O.

The above entitled matter came on to be heard upon the petition of the Erie Railroad Company, Plaintiff in Error for a writ of error from the Supreme Court of the United States to the Court of Appeals of Richland County, Ohio, and upon examination of said petition and the record in said matter and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States questions presented by the record in said matter, it is ordered that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States and that the bond presented by the petitioner be and the same is hereby approved.

ROBERT S. SHIELDS,
Presiding Judge of the Court of Appeals of Richland County, Ohio.

75 [Endorsed:] No. 52. Erie Railroad Co., Pl'ff in Error, vs. Byron B. Marietta, Def't in Error. Order Allowing Writ of Error. McBride & Wolfe, Att'ys for Pl'ff in Error. Filed, Court of Appeals, July 10, 1915. Richland County, Ohio. J. V. Finney, Clerk.

76 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Appeals of Richland County, O., Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Richland County, Ohio, before you or some of you being the highest Court of law or equity in said state in which a decision could be had in the said suit between Byron B. Marietta, Defendant in Error and Erie Railroad Company, Plaintiff in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States and the decision was against the validity or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of said Constitution, treaty, statute or commission, a manifest error

ath happened to the great damage of said Erie Railroad Company s by its complaint appears, we, being willing that error, if any ath been, should be duly corrected and full and speedy justice lone to the parties aforesaid in this behalf, do command you, if udgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings afore-
77 said with all things concerning the same, to the Supreme Court of the United States together with this writ so that ou may have the same at Washington on the 11th day of August, 915, in the said Supreme Court to be then and there held, that he record and proceedings aforesaid being inspected the said Court nay cause further to be done therein, to correct that error what f right and according to the laws and Constitution of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice f the Supreme Court of the United States the 9th day of July and he year of our Lord 1915.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER,
Clerk of the District Court of the United States, Northern District of Ohio.

Allowed.

ROBERT S. SHIELDS,
Presiding Judge of the Court of Appeals of Richland County, Ohio, said Court of Appeals Being the Court of Last Resort of Said State.

78 [Endorsed:] 52. Erie R. R. Company, Pl'ff in Error, vs. Byron B. Marietta, Def't in Error. Writ of Error. McBride & Wolfe, Att'ys for Pl'ff in Error. Filed, Court of Appeals, July 10, 1915. Richland County, Ohio. J. V. Finney, Clerk.

79 UNITED STATES OF AMERICA,
Court of Appeals of Richland County, Ohio, ss:

In the Court of Appeals of the Fifth District of the State of Ohio.

No. 52.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON MARIETTA, Defendant in Error.

Return of Writ.

In obedience to the commands of the within writ, I hereunto transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within case, together with all things concerning the same.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the said Court of Appeals of Richland County, Ohio, in the City of Mansfield, this 30″ day of July, 1915.

[Seal Court of Appeals, Richland County, Ohio.]

J. V. FINNEY,
Clerk of the Court of Appeals of Richland County, O.

80–81 [Endorsed:] No. 52. In Court of Appeals of Richland County, Ohio. Erie Railroad Company, plaintiff in error, vs. Byron Marietta, defendant in error. Return of writ.

82 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

Citation.

To Byron B. Marietta, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of Richland County, Ohio, wherein Erie Railroad Company is Plaintiff in Error and you are the Defendant in Error, to show cause, if any there be, why the judgment rendered against the Plaintiff in Error as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable Robert S. Shields, presiding judge of the Court of Appeals of Richland County, Ohio, this 9th day of July, in the year of our Lord, 1915.

ROBERT S. SHIELDS,
Presiding Judge of the Court of Appeals, Richland County, O.

I hereby acknowledge receipt of copy of the above citation and accept service thereof this — day of July, 1915.

—— ——.

83 [Endorsed:] No. 52. Erie Railroad Co., Pl'ff in error, vs. Byron B. Marietta, Def't in error. Citation. McBride & Wolfe, attorneys for Pl'ff in error. Court of Appeals, Richland County, Ohio, July 10, 1915. Filed. J. V. Finney, clerk.

84 STATE OF OHIO,
Richland County, ss:

Charles Krabill, being first duly sworn, deposes and says that on the 10th day of July, 1915, he served a copy of the citation, the original of which is on file herein and a copy of the paper served on said Marietta is hereto attached to this affidavit marked Exhibit

"A" and made a part hereof. Said Byron B. Marietta is the Defendant in Error in the case entitled Erie Railroad Company, Plaintiff in Error, vs. Byron B. Marietta, Defendant in Error.

CHARLES KRABILL.

Sworn to before me and subscribed in my presence this 10th day of July, 1915.

[Notarial Seal, Richland County, Ohio.]

D. W. FOLEY,
Notory Public in and for Richland County, O.

Tax fee 40 cts.

85 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

Citation.

To Byron B. Marietta, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of Richland County, Ohio, wherein Erie Railroad Company is Plaintiff in Error and you are the Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable Robert S. Shields, presiding Judge of the Court of Appeals of Richland County, Ohio, this 9" day of July, in the year of our Lord, 1915.

ROBERT S. SHIELDS,
Presiding Judge of the Court of Appeals,
Richland County, O.

I hereby acknowledge receipt of copy of the above citation and accept service thereof this — day of July, 1915.

—— ——.

Exhibit "A."

86 [Endorsed:] No. 52. Erie R. R. Co., Pl'ff in Error, vs. Byron B. Marietta, Def't in Error. Citation and affidavit. McBride & Wolfe, attorneys for Pl'ff in Error. Court of Appeals, Richland County, Ohio, July 10, 1915. Filed. J. V. Finney, clerk.

87 In the Court of Appeals of Richland County, O.

ERIE RAILROAD CO., Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Bond on Writ of Error from the Supreme Court of the United States.

Know all men by these presents, that, we, Erie Railroad Company, principal, and National Surety Company, surety, are held and firmly bound unto Byron B. Marietta in the sum of Fifteen Thousand Dollars ($15,000.00) to the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of July, 1915.

Whereas, the above named Erie Railroad Company has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action in the Court of Appeals of Richland County, Ohio.

Now, therefore, the condition of this obligation is such, that if the above named Erie Railroad Company shall prosecute its writ of error to effect and answer all costs and damages if it shall fail to make good its plea then this agreement shall be void, otherwise to remain in full force and effect.

ERIE RAILROAD COMPANY,
By C. E. McBRIDE, *Its Att'y.*
[SEAL.] NATIONAL SURETY COMPANY,
By (illegible) *Att'y in Fact.*

I hereby approve the foregoing bond and surety this 9th day of July, 1915, and said bond is to operate as a supersedeas.

ROBERT S. SHIELDS,
Presiding Judge of the Court of Appeals of Richard County, Ohio.

88 THE STATE OF OHIO,
Richland County, ss:

I, J. V. Finney, Clerk of the Court of Appeals, within and for the County and State aforesaid, do hereby certify that the foregoing writing is a true and correct copy of the Original Undertaking in Error, filed in this court in said case.

In testimony whereof, I hereunto subscribe my name and affix the Seal of said Court, at Mansfield, Ohio, this 30″ day of July, A. D. 1915.

[Seal Court of Appeals, Richland County, Ohio.]

J. V. FINNEY, *Clerk.*

89 [Endorsed:] No. 52. Erie Railroad Co., Pl'ff in Error vs. Byron B. Marietta, Def't in Error. Copy of Bond on

Writ of Error. McBride & Wolfe, Att'ys for Pl'ff in Error. Filed, Court of Appeals, Richland County O., July 10, 1915. J. V. Finney, Clerk.

90 THE STATE OF OHIO,
County of Richland, ss:

In the Court of Appeals of the Fifth District of the State of Ohio.

No. 52.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON MARIETTA, Defendant in Error.

Certificate.

I, J. V. Finney, Clerk of the Court of Appeals of Richland County, Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation and proof of service thereof and certificate of Supreme Court Reporter are the original papers filed in this Court in the above entitled cause; that the foregoing copy of bond is a true and correct copy of the original bond filed in said cause; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said Court of Appeals and used in consideration of said cause; that the foregoing transcript of the docket and journal entries is truly taken and correctly copied from the records of said Court.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Court of Appeals of Richland County, Ohio, this 30" day of July, A. D. 1915.

[Seal Court of Appeals, Richland County, Ohio.]

J. V. FINNEY,
Clerk of the Court of Appeals of Richland County, Ohio.

91 [Endorsed:] No. 52. In Court of Appeals of Richland County, Ohio. Erie Railroad Company, Plaintiff in Error, vs. Byron Marietta, Defendant in Error. Certificate.

92 THE STATE OF OHIO,
County of Richland, ss:

In the Court of Appeals of the Fifth District of the State of Ohio.

No. 52.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON MARIETTA, Defendant in Error.

Certificate of Lodgment.

I, J. V. Finney, Clerk of the Court of Appeals of Richland County, Ohio, do hereby certify that there was lodged with me, as said Clerk, on July 10", 1915, in above entitled cause the following:

1. Original Bond of which a copy is herein set forth.
2. Two copies of Writ of Error as herein set forth; one for defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my Office in Mansfield, Ohio, this 30" day of July, A. D. 1915.

[Seal Court of Appeals, Richland County, Ohio.]

J. V. FINNEY,
Clerk of the Court of Appeals of Richland County, Ohio.

93 [Endorsed:] No. 52. In Court of Appeals of Richland County, Ohio. Erie Railroad Company, Plaintiff in Error, vs. Byron Marietta, Defendant in Error. Certificate of Lodgment.

94 14846.

Bill of Exceptions.

BYRON B. MARIETTA, Plaintiff,
vs.
THE ERIE RAILROAD CO., Defendant.

95 No. 11988. Docket 60. Page 88.

BYRON MARIETTA
vs.
THE ERIE RAILROAD COMPANY.

Bill of Exceptions.

Date of the overruling or decision Aug. 14, 1914.
Exception filed with Clerk of Trial Court Sept. 23", 1914.

J. V. FINNEY, *Clerk,*
By W. S. PEALER, *Deputy.*

(Must be within forty days after the overruling or decision.)

Notice of filing Sept. 24, 1914.

J. V. FINNEY, *Clerk,*
By W. S. PEALER, *Deputy.*

By the Clerk to adverse party or his attorney, forthwith after filing.

I, as adverse party to this Bill of Exceptions, hereby consent to immediate transmission of the same to the Trial Judge.

—— ——.

Objections or Amendments to the Exceptions.

(Must be in Ten Days After said Notice.)

By —— ——, —— —, 191-.
By —— ——, —— —, 191-.
By —— ——, —— —, 191-.
Transmitted to trial judge Oct. 3", 1914.

J. V. FINNEY, *Clerk,*
By W. S. PEALER, *Deputy.*

(Must be either 1, On Expiration of time for filing objections or amendments or within Five Days thereafter; or 2, Immediately on filing of the bill if the consent of the adverse party be indorsed as above indicated.)

Received Oct. 3rd, 1914.

EDWIN MANSFIELD,
Trial Judge.

Corrected and allowed this 3rd day of Oct., 1914.

EDWIN MANSFIELD,
Trial Judge.

Transmitted back to clerk Oct. 3rd, -914.

EDWIN MANSFIELD,
Trial Judge.

Received again by Clerk Oct. 3", 1914.

J. V. FINNEY, *Clerk,*
By W. S. PEALER, *Deputy.*

Filed in Appellate Court Oct. 10", 1914.

J. V. FINNEY, *Clerk,*
By W. S. PEALER, *Deputy.*

Filed Mar. 25, 1915. Supreme Court of Ohio. Frank E. McKean Clerk.

96 Supreme Court of Ohio. Filed Mar. 25, 1915. Frank E. McKean, Clerk.

14846.

STATE OF OHIO,
Richland County, ss:

In Common Pleas Court.

BYRON B. MARRIETTA, Plaintiff,
vs.
THE ERIE RAILROAD COMPANY, Defendant.

Bill of Exceptions.

Appearances:

For Plaintiff, Mr. W. S. Kerr.
For Defendant, Messrs. McBride, Wolfe and Sidell.

Index.

Plaintiff's Witnesses.

Defendant's Witnesses.

Plaintiff's Rebuttal.

97 Supreme Court of Ohio. Filed Mar. 25, 1915. Frank E. McKean, Clerk.

Be it remembered that, on the trial of the hereinbefore entitled cause, at the April Term, 1914, of the Common Pleas Court of Richland County, to-wit, on April 29th, 1914, to a jury, the Hon. Edwin Mansfield presiding as judge, the following evidence was offered, objections were made and exceptions taken:

S. E. STEINER was introduced as a witness on behalf of the plaintiff and, being first duly sworn, was examined by Mr. Kerr and testified as follows:

Q. You are the agent of the Erie Railroad Company?
A. Ticket agent, yes, sir.
Q. Have you a book of rules of the Erie Company that were in force in January, 1912?
A. I have.
Q. Will you let me take it?
A. Well, I have one. Of course, it is a book of rules governing the running of trains etc.
Q. That's what I want.
A. I don't know whether I ought to deliver it up or not.
Q. Now, I will ask you whether these rules governing the running of trains were the rules in force in Mansfield and east of Pavonia on the 5th of January, 1912.
A. So far as I know, they were.
Q. Do they purport to be the book of rules in force at that time?
A. They went into effect, I think, in 1908.

98 (The book of rules produced by the witness was marked "Plaintiff's Ex. A").

Supreme Court of Ohio. Filed Mar. 25, 1915. Frank E. McKean, Clerk.

BYRON B. MARIETTA was introduced as a witness on his own behalf and, being first duly sworn, was examined by Mr. Kerr and testified as follows:

Q. What is your full name?
A. Byron Balliett Marrietta.
Q. What is your age now?
A. 21.

Q. When were you 21?
A. The first of January.
Q. 1914
A. Yes, sir.
Q. At the time of your injuries on the Erie Railroad, what was your age at that time?
A. 19.
Q. Now, Byron, going to the 5th of January, 1912, what did you do, what was your work?
A. Teamster.
Q. What kind of work did you do?
A. Well, most anything, grading, hauling brick and one thing another.
Q. Where and for whom did you work?
A. Bates and Rogers.
Q. Where was that?
A. Out to Ontario.
Q. What kind of work?
A. Putting a siding.
Q. How long prior to that time had you been engaged in that kind of work?
A. Just a few weeks.
Q. How long had you been working altogether, what kind of work had you worked at before you got on the railroad?
A. I mostly worked in the brick yard.
Q. How long did you work there?
A. 5 or 6 months.
Q. At what age did you commence to go out and do work for yourself?
A. When I was 15 years old.
Q. How steadily did you work from that time on up until the time you went to work on the railroad?
A. I never had to want for any work, as soon as I got done at one place there was some other farmer after me.

Counsel for defendant objected to the answer and moved that each and every part of it be stricken out, but the court overruled the motion and defendant then excepted.

99 Q. You say you were a teamster and switched over on to farming. What I want to get at is what work you did from the time you were 15 up to the time you were injured on the railroad?
A. I worked on a farm from the time I was 15 till I was 18.
Q. Where?
A. Well, I worked down by Lexington and I worked out north of town.
Q. And then you became a teamster after you were 18?
A. Yes, sir.
Q. Now, when you were working on a farm, what wages did you earn?
A. 18 dollars a month.

Q. And pay your own expenses?
A. No, sir.

To which question defendant objected and moved that the answer be excluded for the reason that it relates to a time four years ago; but the court overruled the objection and motion and defendant then excepted.

Q. When you were driving a team, how much did you make?
A. $2 a day.
Q. Prior to the 5th day of January, 1912, what was your height?
A. 5 ft. 8½ inches.
Q. Have you been measured or have you measured yourself so that you know what it is now?
A. I was measured last night and I measure 5 ft. 6¾ in.
Q. What was your weight prior to your injury?
A. 180 lbs.
Q. How recently have you been weighed?
A. Well, sometimes I weigh 140 to 145 and sometimes I get down to 128 or 130.
Q. I wish you would state how your weight continued or fluctuated prior to the time of your injury.
A. When I was 15 I weighed 135; when I was 17 I weighed 150; when I was 18 I weighed 165; and when I was 19 I weighed 180 lbs.
Q. Did your weight fall off after that?
A. No, sir.
Q. It was that up to the time of your injury?
A. Yes, sir.
Q. When did you begin to work for the Erie Railroad?
A. The 4th day of December, 1911.
Q. What was the date on which you received your injury?
A. 1912, January 5th.
Q. What were your working hours on the railroad?
A. From 7 till 5.
Q. What section were you employed on?
A. The second section out of Mansfield.
Q. From what point to what point did it extend?
A. From Summit to a little bit east of Pavonia.
Q. To what other point?
A. The top of the hill at Summit.
Q. How far is that from Mansfield?
A. 4 miles out of Mansfield.
Q. How long is this section that you were employed on?
A. 4 miles.
Q. And who was the section boss?
A. William Kyle.
Q. Was he boss during the time you were there?
A. Yes.

Q. Did you ever have any experience working on the railroad prior to that time?

A. No, sir.

Q. Now, take it the day before these injuries, did you have any instructions or was anything said to you by the foreman as to where you were to work the next day?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. To get there a few minutes before 7 to get the tools out ready to go to work when he got there.

Q. What point was indicated where you were to go to work?

A. Where Summit used to stand.

Q. It was always there, wasn't it?

A. No, it was down there by —— Crossing. It was moved a little before I got hurt.

Q. They didn't call it that before you were hurt?

A. Yes.

Q. It was there you were to meet?

A. Yes, sir.

Q. How many men were working on the section at that time?

A. About 8 men.

Q. Do you know where they lived?

A. Mr. Jennings and his son lived west of my uncle's.

101 Q. Where did your uncle live?

A. He lived about west of Summit about ¼ of a mile.

Q. On which side of the track?

A. The south side.

Q. Did the railroad run through his farm?

A. Yes.

Q. How far from the track did he live?

A. About ⅛ of a mile.

Q. Was there a road crossing anywhere near your uncle's place?

A. Yes, sir.

Q. Where is that road?

A. It was back off the main road about ⅛ of a mile. There is a road that comes down to another road on Pugh's place.

Q. Is that on the Robinson place?

A. No, it runs through Pugh's.

Q. Is there a road from your uncle's house down to the railroad?

A. Yes, a private road.

Q. Where does it run after it crosses the railroad?

A. Just into the field that he has on the other side of the track.

Q. What direction does that road run?

A. North and south.

Q. Where did that father and son live with reference to your uncle's?

A. They lived a little bit west.

Q. How far from your uncle's place?

A. About ⅛ of a mile.

Q. Now, was there *and* road from their house to the railroad track?

A. They had a path wore from their house to the railroad track where they constantly went over.

Counsel for defendant moved that the answer be stricken out, but the court overruled the motion and defendant then excepted.

Q. What made that path, if you know?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. The men walking back and forth to their work.

Q. Which men?

A. The Jennings men.

Counsel for defendant objected to the question and moved that the answer be excluded but the court overruled the objection and motion and defendant then excepted.

102 Q. Now, when they got on the track on this path, how far would they be from the private road that ran down from your uncle's house across the railroad?

A. About ⅛ of a mile.

Q. What direction?

A. They were west of it.

Q. Now, on this morning in question or any other morning while you were there, that you know of, if they were going to start to work near where this tower was or this summit, how did they go, to your knowledge?

A. They came out from the house to the railroad track and right down the track.

Q. How did they get from the house to the railroad?

Judge Wolfe: What is the difference?

Mr. Kerr: There is a good deal of difference.

Objection by defendant; overruled; exception by defendant.

A. Well, down through the yard to the railroad track.

Q. How would they go with reference to the road you came down on to the tower?

A. They always came down the same way I did.

Q. Was there any other man that lived along the track that worked on the section at the time you did?

A. A man named "Cooney Arnold", he lived on the Remy place about a mile west of Jennings, on the north side of the track.

Q. Where would that be with reference to the two men you spoke of and where your uncle lived, where you staid?

A. Well, about a mile west of where the two Jennings lived.

Q. Was there any road leading from their house to the track?

A. No, sir.

Q. To your knowledge, how did they get to the railroad and to the place of work?

A. Across a little lot, a little piece of a field, on to the railroad track and down the track.

Q. Where would they pass, in going down to this tower, if that was the place they started to work, with reference to the place you came down?

103 A. They passed through to my uncle's farm, then through his farm and down to the tower.

Q. How long did you work on the section?

A. Just a month.

Q. And during that time did these men go down that way as you did?

A. Yes, sir.

Q. Where did the rest of the men live?

A. One man lived about a mile south of us.

Q. How far from the track?

A. Well, he had a field back of his yard that went right back to the track.

Q. What would he do to go to work at the tower?

A. He would go up the bank on to the railroad and walk up the track.

Q. In what direction would he walk the track?

A. He had to walk west.

Q. Now, where did any of the rest of them live?

A. They were foreigners and had a car at Pavonia. They would stay there and wait for the foreman, put the hand car on and come up to the place where we worked.

Q. Was it right up to the tower where you started to work?

A. Yes.

Q. Where did the boss live himself?

A. He lived about ⅛ of a mile north of Pavonia.

Q. How did he get to the railroad, do you know?

A. He walked.

Q. Where would he strike the railroad?

A. At Pavonia.

Q. Where was the hand car kept?

A. It was kept at Pavonia.

Q. Now, then, in the morning in question, what time did you leave your uncle's house?

A. About 6:40.

Q. How far did you have to go, now, as near as you can tell, from your uncle's house till you would get to the place where you were to start to work?

A. About ¼ of a mile.

Q. Did you know the section boss?

A. Yes.

Q. Did he know where you lived?

A. Yes.

Q. Did he know where these other men lived that lived along the track?

A. Yes, sir.

Q. Now, I will ask you to state to the jury whether there was any other way that you could have got to this point on the railroad to commence work.

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. I would have had to go out to the road, under the overhead bridge, a mile to the road,—then I would have had to go two miles to Savonia and I would have had to walk back two miles up the track.

Q. Is there any other way? If so, I wish you would tell the jury, by which you could get to your place of work without walking some distance on the railroad track?

To which question defendant objected, the court overruled the objection and defendant then excepted.

Q. Now, I wish you would state to the jury, so that they can get it clearly, what direction you went and how far, as nearly as you can approximate it, till you got to the railroad that morning?

A. I left the house about 6:30, I started to get down to the railroad about 6:40, I waited a little bit and started down the track.

Q. What kind of weather was it?

A. It was awful cold, the wind was blowing and there was a little spit of snow.

Q. About how cold was it?

A. Pretty close to zero.

Q. Did you have anything on your head?

A. I had a cap on my head.

Q. What kind of a cap was it?

A. It had ear tabs coming down on the sides.

Q. When you come out to the road and started down, how many tracks did you cross?

A. I crossed the south track and got on to the north track so that trains coming would face me.

Q. From your knowledge, what is the south track? How do the trains run on that?

A. They came from the west and went east.

Q. That is, they came from Mansfield and went east?

A. Yes, sir.

Q. And how did the trains run, as you knew them while you were there, on the north track?

A. They ran from the east to the west and I was walking on that track so they would face me.

Counsel for defendant moved that the latter part of the answer be excluded and the court instructed the jury not to consider it.

Q. Now, during the month you worked on that track, how many trains would pass the men on the section and the men going to work in the morning and going back in the evening?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. Well, while we were going to work not very many trains would pass.

Q. Whether there would many pass while you were working?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. While we were working there were a good many trains pass.

Q. During those hours what kind of trains would pass?

Objection; overruled; exception by defendant.

A. Freight trains and passenger trains.

Q. Now you started down the west bound track, what did you do when you went down the track?

Counsel for defendant objected to the statement and question combined.

Q. Well, what did you do?

A. I kept looking out to see if there was any trains coming.

Q. When you got a ways along there did any train come?

A. Yes, sir, there was a passenger train come down the hill.

Q. What do you mean by the hill?

A. Down grade.

Q. What direction does the down grade run?

A. It runs to the east.

Q. Do you know how much of a grade it is?

A. I don't know; it is a pretty steep grade, I think.

Counsel for defendant moved that the latter part of the answer be stricken out, but the court overruled the motion and defendant then excepted.

106 Q. When the passenger train passed you, what happened, if anything?

A. Well, I kept looking back and as the passenger train was just about past me something struck me.

Q. Did you know anything more at that time?

A. Nothing more at that time.

Q. When did you regain consciousness?

A. When I was lying in the caboose.

Q. Where was the caboose?

A. I don't know, it was attached to some train.

Q. Where were you taken from there, if you know?

A. I was taken to Summit and they stopped there and I told them to telegraph——

Objection by defendant to what was said: sustained.

Q. Where — you taken from there?

A. I was taken to Mansfield from there.

Q. To what place?

A. To the hospital.

Q. Emergency Hospital?

A. Yes.

Q. What direction was this passenger train going that came down there as you were walking down the track?
A. It was going east on the east bound track.
Q. Now, what direction was whatever it was that struck you going?
A. It was going the same direction I was, going east on the west bound track.
Q. Where was that with reference to the position of the passenger train?
A. It must have been right at the rear of the passenger train.

Objection; sustained; answer stricken out.

Q. Well, where was it?
A. It was on the west bound track.
Q. Where was it with reference to the passenger train?
A. At the rear end of the passenger train.
Q. Was it along side of it or some where else?
A. Right along side of it.
Q. That's what I want to get at. Now, do you know which way it was running, did you see the engine at all?
A. No, sir.
107 Q. Was it coming toward you in front?
A. No, sir, it was coming back of me.
Q. Going the same direction as the passenger train?
A. Yes, sir.
Q. Now, was there anything in the way of smoke or anything from the passenger train?
A. Yes, smoke and steam blowed down over me that morning so I couldn't see back at all.
Q. What did you have, if anything, what were you carrying?
A. I was carrying my dinner bucket.
Q. Did you have anything else?
A. No, sir.
Q. What kind of clothes were you wearing?
A. I was wearing overalls and coat.
Q. How long did you remain in the hospital?
A. About 10 weeks.
Q. Where were you when you were in the hospital, how were you confined?
A. I was confined in bed ten weeks. I was out of bed two or three times.
Q. What doctor treated you?
A. Dr. McCullough.
Q. Do you know how he came to attend you?
A. He was the Company's doctor.
Q. Did you employ him?
A. He was waiting at the hospital.
Q. Was there any other doctor that attended you or was called in while you were at the hospital?
A. Dr. Loughridge was there when I went in and Dr. Black was called in.

Q. Did you call any of those doctors yourself?

A. I was unconscious at the time Dr. Black was called but my sister called him.

Motion to strike out the answer sustained.

Q. Did you call in any doctor yourself?

A. No, sir.

Q. Now, after you got to the hospital, what was the first thing that you remember, how long after you were taken there, if you can tell? What was the first thing you remember going on after you regained consciousness, after you went to the hospital?

A. The first thing I seen going on was a lot of men standing there and they wanted to give me ether——

Objection as to what was said; sustained.

Q. Now, what was done after you knew what was going
108 on?

A. They put me to sleep as soon as I got there.

Q. After that what did you see first, when you came out of that condition?

A. I don't remember, I just came in and out for three weeks.

Q. During that time state what the facts are as to whether you suffered any pain.

A. I suffered a great deal of pain.

Q. Can you tell something about how it was and where it was located more particularly.

A. In my back and hips.

Q. Could you tell before the expiration of the three weeks how many times any doctor came to see you?

A. No, sir.

Q. After the three weeks, do you remember how many times any doctor came to see you?

A. The doctor came every couple of days.

Q. What doctor was that?

A. Dr. Cullough.

Q. From that time on until you were taken away from the hospital I wish you would state what pain, if any, you suffered and how, during that time.

A. Mostly in my hips and back and this one leg, the left leg. I suffer pain in that to-day.

Q. What was the condition of your health prior to the time of your injury, what was your physical condition before that time?

A. I never was known to be sick a day in my life. I never was sick in bed until I went to the hospital.

Q. When you left the hospital, where were you taken?

A. I was taken to my uncle's.

Q. How were you taken there?

A. In Beelman's ambulance.

Q. What did you do when you got there?

A. I laid in bed a week and then they tried to get me up to see whether I could walk.

Q. Can you tell how many weeks or months it was after the injury that you first got out of bed?
A. About the middle of April.
Q. Had you been up any time prior to that?
A. Just up an hour or two.
Q. Now, then, when did you first make an effort to walk?
A. Well, about the middle of April they led me around
109 the room.
A. How would they lead you around the room?
A. Put their arms around me, one on each side.
Q. What use did you have of your legs at that time?
A. My right leg, I didn't have any control over it at all. It would flop any way at all. I couldn't use it. My left leg was so I couldn't put my weight on it at all.
Q. How soon after they assisted you around the room did you get crutches or some other way of getting around?
A. About a month.
Q. What was your condition as to your power to walk on your leg before you got crutches?
A. It took a couple of weeks before I could walk with crutches by myself.
Q. Then how did you get around from that time on to this time?
A. I have been walking on them ever since.
Q. Can you walk without crutches?
A. No, sir.
Q. Explain to the jury, if you know, why you can't walk without crutches.
A. This bone here in my leg is dislocated and broke across here (indicating) and the ligaments is tore off so that, when I go to put my weight on it, it will fly back.
Q. How do you mean it will fly back?
A. It is out of place instead of its normal position and it goes back so far that I can't put my weight on it.
Q. How about the other one?
A. Well, it is not much better but I still put my weight on it.
Q. Can you bear your entire weight on either leg?
A. I can bear my weight pretty well on my right leg.
Q. Now, about your shoulder, what do you notice about your shoulder?
A. In June after I was hurt I went to turn over in bed and my collar bone was broken and the doctor came out——

To which defendant objected for the reason that there is nothing in the petition on that subject. Counsel for plaintiff stated that it is offered for the purpose of showing that it rebroke twice.
110 Court: With that limitation it may go in.
To which ruling defendant excepted and moved that each and every portion of testimony on this subject be stricken out; which motion the court also overruled and defendant then excepted.

Q. What doctor came out?
A. Dr. McCullough.

Q. What did he do?
A. He reset it.

To which question defendant objected and moved that the answer be stricken out, which objection and motion the court overruled and defendant then excepted.

Q. Did anything happen to your collar bone after that?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. The latter part of August it broke again.

Motion to strike out the answer; overruled; exception by def't.

Q. Was Dr. McCullough called or did he see you after that?
A. No, he wasn't called the last time.
Q. What is the condition of it now?
A. It is pretty good just now.
Q. What effect, if any, does it have on the use of your arm on that side?
A. I haven't got the use of my arm as well as I had before it was broke. I can't get it around as well.
Q. Can you locate it so that the jury can see where the break was?

(Witness pointed to his right collar bone).

I wish you would exhibit to the jury your fingers. (Witness exhibited his hand to the jury.)

Q. What fingers were injured?
A. The index finger was taken off close to the nail and the big finger was mashed.
Q. Do you know what became of that part of the finger that was taken off?
A. My cousin has the end of it.
Q. Did you see where it was until afterward?
A. No, sir.
Q. I wish you would indicate to the jury where your arm was broken.
A. (Witness indicated the upper part of his left arm.) Right there the arm is broken.

111 Q. State to the jury what the condition is as to the use of your arm.

A. I haven't a grip in that hand on account of the break there in the muscle.
Q. Whereabouts was your right arm broken?
A. It was the collar bone that was broken there.
Q. What is the fact as to whether you can lift weights or do anything with your arm, do any work with it?
A. My back is weak.
Q. I will get to that presently. Have you ever tried to do something?

A. With my arms?
Q. Yes.
A. Yes.
Q. Now, explain to the jury what you did and what experience you had, if any.
A. Well, last fall I tried to sew carpet rags and I couldn't stand it.
Q. What happened, how did you feel?
A. I just gave out, weak. I tried to make fancy work and I couldn't stand it.
Q. Now, explain to the jury what the condition of your back is, as far as you know from the sensation of feeling, since your injury.
A. Since I have been injured that time I can't sit up straight.
Q. How does it feel?
A. I twitch and jerk there.
Q. I will ask you, from the condition of your back, whether you can do any lifting or any work.
A. No, sir.
Q. Now, I wish you would exhibit to the jury, as nearly as you can, where your legs were fractured.
A. That leg was fractured through that bone (indicating) and the other is fractured right through there.
Q. Pull up your pants and drawers and let the jury see your leg.
A. (Showing the jury.) There is where one bone is broke in the middle, the right one, and the other one is the upper half, both bones broken.
Q. Is there any dislocation in the knee there that you know of?
A. No, that is on the other leg.

Counsel for plaintiff asked that the plaintiff be permitted to strip and exhibit his leg to the jury.

On motion of defendant, this examination was deferred
112 until a doctor was present.

Q. Since your injuries, what have you noticed with regard to your pulse, if anything?
A. In pretty bad shape.

On motion of defendant the question and answer were stricken out for the reason that there is nothing on that subject in the petition.

Q. Now, when you were walking down the track, after you got on the west bound track, I will ask you to state whether you believed that any train would come down on the west bound track from the west?
A. No, sir.

To which question defendant objected and asked the court to strike out the answer.

Mr. Kerr: It is offered for the purpose of rebutting any inference. The question of a man's care depends somewhat on what he believes.

The court sustained the objection and motion and instructed the jury not to consider the answer.

Recess.

Q. Where you came out of the road on to the railroad track, how far was it from there east to where you were struck by this engine?

A. I can't just tell you how far—a little bit better than ⅛ of a mile or along there somewhere.

Q. How did you identify the place?

A. It was right on the curve.

Q. Where was the curve with regard to where you were struck?

A. Right back.

Q. What direction?

A. West of me.

Q. You were walking east?

A. Yes, sir.

Q. From the place where you were struck, how far could you see back?

A. I couldn't see more than half the train length back.

Q. Now, could you measure it by fields or anything so that you could tell how far it was?

113 A. There were several fields along there but I don't know how wide they were.

Q. You think it was about ⅛ of a mile from where you came on to the track?

A. Yes.

Q. How far was the tower as it was located then from Pavonia Station?

A. Just about 2 miles.

Q. How far was it from where you were struck to the tower?

A. Amout 2 miles.

Q. To the tower?

A. No.

Q. How far to where the tower was then?

A. Well, it was 4 miles.

Q. I am asking where it was then. Is it in the same place now as it was then?

A. Yes.

Q. You are referring to where it used to be?

A. Yes.

Q. How long had it been changed up there?

A. It had been changed up there a couple of weeks.

Q. As you went down the track, what was there, if anything, along side of the Summit track or east bound track?

A. Wires were there and blocks on the side of the east bound track.

Q. How were they located?

A. They were strung on little poles a foot and a half high, little blocks 2 x 4.

Q. Was there any walking place on that side?

A. No, sir.

Q. What was there, if anything, on the north side of the west bound track that you were walking on?

A. There was a bank and there wasn't much of a ditch. The bank came down to the edge of the track and that was filled with slack and lumps of cinders.

Q. What size?

A. O, some as big as from a peck to ½ bushel.

Q. How was the slope from the ties down to the side, what kind of a slope, if any?

A. O, it had a little slope but not very much.

Q. What was it on the side there?

A. It was filled with slag.

Q. What is that?

A. It is a kind of a hard stone, in my estimation, or cinders.

114 Q. Can you describe to the jury how it was all along that side, as you remember?

A. Well, all along that side, when they went to raise the track up they dumped slag there and it would roll down into the ditch and be left lay there, and it got just filled full of slag and stones so that you couldn't walk in it. The only place to walk was on the track.

Q. How far apart were the two tracks there?

A. About a foot from one tie to the other.

Q. Was there any safe place to walk between the tracks?

A. No, sir.

Cross-examination by Judge Wolfe:

Q. What do you mean to say when you say there was a foot between the ties?

A. From one tie end to another tie end. There is ties on each track and they are not over a foot from one to the other. Sometimes they are not that much, sometimes they are longer than others.

Q. Do you mean to say that is the condition all along the track, where there is a double track?

A. Yes, sir.

Q. There is a double track all along betwixt Mansfield and Pavonia, for that matter, and was then?

A. Yes, sir.

Q. Now, do you live at your uncle's?

A. Yes, sir.

Q. What is your uncle's name?

A. Philip Hecht.

Q. Did you work on the track, was that your work?

A. Yes.

Q. And you helped build the track, repair the track?

A. Yes, sir.

Q. How far apart do you say those double tracks are laid in the section on which you worked,—that was four miles, was it?

A. Yes.

Q. How wide was it?
A. Well, from the tie ends it wasn't over——
Q. No, I mean the tracks.
A. Well, about 4 ft.
Q. That is, it is 4 ft. between the nearest rail on the east bound track to the nearest rail on the west bound track?
A. Well, it might be 6 ft.
115 Q. Was it 6 or 4 ft.?
A. Well, say 6 ft.
Q. Do you know what the distance is from the center of one track to the center of the other track?
A. No, sir.
Q. Do you know the distance between the rails?
A. No, sir.
Q. You don't know the distance betwixt the rails of an ordinary railroad?
A. No, sir.
Q. You don't know whether it is 5 or 10 ft.?
A. I know it ain't ten ft.
Q. Well, what is it?
A. That's more than I can say but I know it is not ten feet.
Q. If it isn't ten feet, how many feet is it?
A. It is between six and four ft.
Q. How long had you been laying track?
A. Just a month.
Q. You worked long enough to know that the gauge of a track is from four to six ft.?
A. I won't say for certain how wide it is but it is from four to six ft. I think.
Q. Now, are you willing to say how wide it is between the nearest rail of the east bound track and the nearest rail of the west bound track?
A. That is more than I can say, how wide that is.
Q. If you don't know that, how are you going to tell us the distance between the ties?
A. They ain't very far apart, some of them ain't half a foot.
Q. How do you know that?
A. If you would happen to be walking along there, you would stub your toe and fall on your nose.
Q. If you would walk between the rails?
A. Yes.
Q. Do you know how far the ties are laid apart in the track?
A. Some of them a half a foot and some a foot.
Q. That is the way you put it?
A. Yes, sir.
Q. How long is a tie?
A. I thing they are about 8 ft. long.
Q. How is the road bed filled up between the ties?
116 A. With cinders and slag hammered down in with a pick
Q. Did you help put that in?
A. Yes, sir.

Q. Did you help put that in along where you were hurt?
A. Yes, sir.
Q. So you know how it was put in?
A. Yes, sir.
Q. And you know how it ought to be put in?
A. Yes, sir.
Q. Wasn't it well put in
A. It was pretty well put in.
Q. It was put in all right, in your judgment, and made a good, solid place for trains to run on?
A. It made a pretty good place.
Q. Was there any place that was made for a foot-man's path along there?
A. No, sir.
Q. No place of that kind?
A. No, sir.
Q. And you knew that, that there was no place for a footman's path?
A. Only in the middle of the track where all the rest of the men walked.
Q. Was there any place that the foreman directed you to fix a place for a footman's path to be travelled by anybody that went along there?
A. No, sir.
Q. Nor for the railroad laborers?
A. No, sir.
Q. So it was built for a railroad?
A. Yes.
Q. What was along there where you were hurt,—there was a fill, is that right?
A. There was a cut.
Q. There was a cut and not a fill. Can you tell how much a tie extends beyond the rail?
A. No, I don't know.
Q. You don't know how far from the end of the tie the rail is placed?
A. I don't know exactly, some of them are longer than others and some are shorter.
Q. That is all you know about it, some are longer and some are shorter?
A. I can't tell you how much they vary.
Q. Now, the place where you were hurt was a cut?
A. Yes, sir.
Q. The sides went up?
A. Yes.
Q. How much, do you say?
A. About 10 ft. of a cut.
Q. Do you mean to say that the land on the sides was 10 ft. higher than the railroad along there?
A. Yes, sir.

Q. Did you ever measure it?
A. No, sir.
117 Q. So you know it is not half of ten feet?
A. I know it is all of ten feet.
Q. Now, at the side of the track there is some drainage?
A. Not on the north side.
Q. Is there on the south side?
A. That is filled with these wires, with the blocking.
Q. Those wires are there for railroad purposes, aren't they?
A. Yes, sir.
Q. And those wires run right close to the track?
A. No, sir, they run in the ditch.
Q. Right along the track?
A. They run right along in the ditch, they are all of 4 ft. from the track.
Q. What is the length of those wires that are used for the blocks?
A. About ⅛ of a mile long.
Q. And if they didn't run along the track, they might go over in the field somewhere?
A. Why, sure.
Q. Don't you know that they run right along the rail?
A. No, they don't.
Q. Do they run on the north or south side?
A. South of the south track.
Q. And you mean to say they are four feet from the rail?
A. Yes, sir.
Q. How wide is a box car or a passenger car in a train?
A. I don't know.
Q. You don't have any idea of that at all?
A. No, sir.
Q. Now, betwixt rail and wire what is there along there?
A. The bed of the ties, the slope of the bed.
Q. From the ties to the wire?
A. Yes.
Q. How much space was there between the ends of the ties and the wire?
A. The bank starts to slope from the ends of the ties down to the wires.
Q. How far is it?
A. A couple of feet down.
Q. Then the ties would be two feet beyond the rail?
118 A. No, about a foot and a half.
Q. If it is 4 ft. from the track to the wire and it is 2 ft. from the end of the ties to the wire, it must be 2 ft. from the end of the ties to the wire?
A. You must remember that the road bed is raised 2 ft., some places 2½ ft. higher than the ditch where the wires are. There ain't much of a walk along there.
Q. I am not asking you about a walk, I am asking you how far it was.

A. Well, it is 2 or 2½ ft.
Q. From the end of the ties down to the wires 2½ ft?
A. Yes, sir.
Q. How many wires were there?
A. I don't know how many.
Q. Do you know whether there was one or three?
A. There was more than three.
Q. How many?
A. That is more than I can tell you.
Q. You won't say any nearer than that?
A. That's more than I can say.
Q. You know there was more than three but you won't say that ere was more than four, is that right?
A. Yes, sir.
Q. How far were they apart?
A. About 4 inches apart.
Q. Those wires were pretty well placed?
A. Yes, sir.
Q. Did they operate the blocks readily when they were used?
A. Sometimes.
Q. Didn't they do as well as the ordinary?
A. Yes.
Q. They are quite necessary to the running of trains?
A. Sure.
Q. That is the system known as the block system?

Mr. Kerr: I don't suppose he knows much about the block system.

Q. What kind of a fence was there along the railroad?
A. Well, there is a wire fence there.
Q. How far is it to the fence?
A. I don't know just how far it is.
Q. Is it a foot or a rod?
A. O, it is more than a foot.
Q. Is it more than a rod?
A. That is more than I can say.
Q. Is it two rods?
A. That's more than I can say, I don't know how far it is.
119 Q. At any rate, there is a fence there?
A. There is.
Q. When was it you started from your uncle's?
A. About 6:40.
Q. How do you know?
A. I looked at my time.
Q. Do you remember looking at your time that morning and hat it was 6:40?
A. Yes, sir.
Q. Do you remember what time it was the morning before when ou started down?
A. No, I don't.

Q. Do you know what time it was the morning before that, the morning of the 3rd of January?

A. Sure, I looked at my time. I always looked at my time to see whether I was late.

Q. Do you remember looking at your time the morning of the 5th?

A. Yes, sir?

Q. Do you remember what time it was the morning of the 4th?

A. No, sir.

Q. Or the morning of the 3rd?

A. No, sir.

Q. Or the 2nd?

A. I don't think I worked on the 2nd.

Q. Or the 1st?

A. No, sir.

Q. Can you tell any morning but that when you remember what time it was?

A. No, sir.

Q. Now, you remember that, on the 5th, it was 6:40?

A. Yes, sir.

Q. It wasn't 6:41?

A. No, sir.

Q. It was just 6:40?

A. It might take a few seconds of time to put my hat and coat on.

Q. After you got your hat and coat on, you looked at your time on the morning of the 5th, didn't you?

A. Yes, sir.

Q. Did you look before you put your hat and coat on that morning?

A. I always did.

Q. Did you that morning?

A. Why, sure.

Q. And on the morning of the 4th?

A. Yes, sir.

Q. And then you put your hat and coat on after you looked?

A. Yes, sir.

Q. And that was true on the 3rd?

A. Yes, sir.

Q. Where did you go on the morning of the 3rd?

A. I went to the same place where I was going the morning of the 5th.

Q. Where did you go the morning of the 5th?

120 A. I was going to work.

Q. Where did you go the morning of the 3rd?

A. I went to the tower to start to work.

Q. Where is the tower?

A. That's where the tower used to be there, 2 miles this side of Pavonia.

Q. And that's where you went to work the 1st of January?

A. No, we was ordered down to Pavonia.

Q. Where did you go to work on the 1st of January?

A. There was an order to go to Pavonia that morning.
Q. Where did you go the 31st of December?
A. That was Sunday.
Q. Well, didn't you go to work that morning?
A. Not very likely.
Q. On the 30th of December, where did you go?
A. I don't remember just where we went. I believe we was up on top of the hill that morning.
Q. Now, on the 1st of January, where did you go to work?
A. I went to Pavonia.
Q. And on the 2nd?
A. I didn't work on the 2nd.
Q. Well, on the 3rd?
A. I went over the Summit or where Summit used to be.
Q. You went to Pavonia, didn't you?
A. No, we was ordered to Summit.
Q. I asked you where you went.
A. We went to where Summit was.
Q. On the 4th where did you go?
A. We went to Summit.
Q. On the 5th where did you start to go?
A. I started to go to Summit.
Q. How far was Summit from the road that leads out from your uncle's house?
A. About one-fourth of a mile.
Q. And it was east from there?
A. The road was, yes.
Q. What kind of a road was that road out there?
A. Just a private driveway that went through our farm.
Q. From one farm to another?
A. No, just from the barn down across the railroad to
121 his fields on the other side.
Q. That was a road maintained by your uncle for his private use?
A. Yes, sir.
Q. And you walked out there and took the railroad to Summit, as you say?
A. Yes, sir.
Q. What was in the field that was to the east of your uncle's there,—on the 5th of January what was in that field?

Objection; overruled; exception by plaintiff.

A. There was a big ditch there, a big wash out.
Q. Was there anything else in that field but a ditch and a wash out?
A. No.
Q. Where was that ditch and wash out?
A. It started at the spring at the house and went down and there was a wash-out in the field, and then it went down under the track.

Q. Wasn't there anything in the field but that?
A. No, sir.
Q. There wasn't any wheat or oats?
A. No, sir.
Q. Wasn't it in a state of cultivation? Did you never go into that field?
A. Nothing was in it, I don't think.
Q. Well, there would be no objection to your going into that field?
A. I guess not.
Q. Your uncle didn't object to it. Did you ever see your uncle in there?
A. Once in a while.
Q. Did you ever see him in there when he fell into the ditch?
A. No, sir.
Q. What was there that kept you from going across that field over to where Summit was?
A. Why, climbing over fences. A section hand isn't expected to climb fences to go to work. He is supposed to get to work the easiest way he can.

Judge Wolfe: I ask the court to instruct the jury not to consider what the witness says a section hand is expected to do.

Court: The latter part of the answer is not responsive
122 to the question; the jury will not consider it.

Q. How far was it from your uncle's house to the Summit?
A. I don't know.
Q. Where was Summit on this map,—right in here, wasn't it (pointing to the map)?
A. That is where it is now but it is not where it was then.
Q. Where was it then?
A. Down at this corner.
Q. Where was your uncle's house?
A. Right in there.
Q. Here is the lane or drive-way, as you say, and instead of going down here to the Summit, you went away up here (indicating)?
A. There is no road there.
Q. You went up the lane and down the track, or you were attempting to do that, instead of going across the field to the track?
A. It would take longer to go across the field than it would to go the other way.
Q. You did that?
A. Yes, sir.
Q. Was there anything in the field that you were afraid of?
A. I have never seen anything.
Q. Now, these other gentlemen that had their lanes up there or private walk ways,—did they take those ways to get on to the track?
A. They took out to the track and then right down the track.
Q. Now, when you got to the track, you spoke of a train that came down behind you?

A. Yes, sir.
Q. On the west bound track——

Objection: He didn't say that.

A. There was an engine, I think, that came down behind.
Q. On the west bound track?
A. Yes, sir, supposed to be on the west bound track,—supposed to go west on that track and came down east.
Q. Came down east on the west bound track?
A. Yes, sir.
Q. And that was the first time you had ever seen an engine going east on a west bound track?
A. Yes, sir, in fact, I didn't see that one.
Q. You knew it was a railroad?
123 A. Why, I seen the ties and rails there, anybody would know that.
Q. It was not at a public road crossing where you were, was it?
A. No, sir.
Q. How far was it from one?
A. I don't know.
Q. Well, give your judgment?
A. About ¼ of a mile.
Q. And you were not walking across the track but you were walking right along where the trains run, that's what you were doing?
A. Yes, sir.
Q. Well, you knew there was a train coming on the other track, didn't you?
A. I looked back and seen the train on the other track. I didn't see this one coming. I didn't think of it coming on that track.

Counsel for defendant moved that the lat-er part of the answer be stricken out, the court sustained the motion and instructed the jury not to consider it; to which plaintiff then excepted.

Q. Now, did you see the engine that you have said struck you, did you see it that morning at all?
A. I seen it when it was in operation pushing another train up the hill.
Q. It was pushing a train up the hill?
A. It didn't have its train, it was helping another train.
Q. It had a train ahead of it and an engine was at the other end pulling and this engine was at the rear end pushing?
A. Yes, sir.
Q. Now, where did that engine come from?

Mr. Kerr: I don't suppose he knows.

A. I don't know where it came from.

Judge Wolfe: He agrees with you, Mr. Kerr. I object to the interference.

Q. Didn't you know that it had been connected to another train?
A. I didn't know that it had a train down below there.

Q. You had been down to Pavonia every day but one for a month?
A. I didn't have to go to Pavonia every day.
Q. Almost every day?
A. I wasn't at Pavonia but once or twice.
124 Q. How often had you been to Pavonia in your life time?
A. About half a dozen times.
Q. You knew that they didn't keep any engine down there for use?
A. No, sir, I didn't know that.
Q. Did you ever see an engine down there for use?
A. I seen an engine down switching in the yards. I didn't know where it staid, whether it staid there or not.
Q. At any rate, there was a train pushed up by that engine?
A. Yes.
Q. And you expected that engine to continue right along and push it on through to Mansfield, did you?
A. Yes, sir.
Q. Will you swear to that?
A. Yes, sir.
Q. And yet there was a train right below that that it had been cut off from?
A. I didn't know that.
Q. Have you since learned there was?

Objection.

A. No, sir.
Q. You signed this petition, didn't you?
A. Yes, sir, that is my signature.
Q. Did you tell them what to put in there?
A. No, my guardian came in and made that out.
Q. And you didn't know whether it was right or not?
A. No, sir.
Q. You knew there were no trains working down in the field off the railroad?
A. No, there wasn't any there.
Q. And you knew there was no danger if you had taken a short cut to Pavonia or to your working point?
A. Where would you take a short cut through?
Q. How long was it before your injury that the engine and train passed you going up the hill?
A. They didn't pass me, they were going up the hill before I got to the track.
Q. You saw them?
A. I seen them coming up the hill.
Q. You saw the combination, the engine in front, the train, and the engine behind?
A. Yes, sir.
A. You saw them going up the hill before you reached the track?
A. Yes, sir.
125 Q. When was it you saw the train, if at all, that was standing idle there with the engine cut off?

A. I didn't see any train there.
Q. How near were you to the track when this combination train went up?
A. Well, I was quite a little ways from it. I had just left the barn when it past our lane.
Q. And when you got to the tracks, which track did you take?
A. I took the west bound.
Q. And you started east on that?
A. Yes, sir.
Q. Why didn't you take the east bound track and start east on that?
A. Most generally when a man takes a track, he walks so that a train will face him.
Q. You took the track where more probably the train would face you?
A. Yes, sir.
Q. And you knew when you took it that, if any train would come, you would have to get out of the way?
A. Why, no. O, if a train came toward me I would. If a train came facing me I would have to get out of the road but I never thought or expected a train to come back of me.

Counsel for defendant asked the court to exclude each and every part of the answer; but the court overruled the motion and defendant then excepted.

Q. You knew where Summit was?
A. Yes, sir.
Q. And you knew it was the highest point on the track?
A. Where it is now.
Q. I am asking about then. You knew there was a point where the railroad reached a high plane and then ran down the hill to Mansfield?
A. Yes, I did.
Q. And you knew it was a very steep grade between that point and Pavonia, didn't you?
A. Yes, sir.
Q. And that grade was down hill toward the east, wasn't it, toward Pavonia?
A. Yes, sir.
Q. And you knew that the combination train with the
126 engine on behind, you knew that the engine was intended to push that train up to that point and then it could be pulled on by the other engine?
A. No, sir.
Q. You didn't know that?
A. No, sir.
Q. You ventured on that track without knowing that much about a railroad?
A. Yes, sir.
Q. And you were 19 years of age?
A. Yes, sir.

Q. What wages were you getting?
A. $1.50 a day.
Q. Did you know what your friends were getting around you?
A. The same amount,—they got $1.50 a day.
Q. You were getting a man's wages, $1.50 a day?
A. Yes, sir.
Q. And you didn't know that the work of an engine was to pu a load up to the summit of the track?
A. No, sir.
Q. When did you find that out?
A. I haven't found it out yet.
Q. You don't know that yet, that that is the purpose of the helping engines? And with that knowledge of railroading you g right out on the track and walked on it, didn't you?

Objection; overruled; exception by plaintiff.

Q. And yet you did know that you would have to look to the ea for a train going west on the west bound track, didn't you? Yo knew that much about a railroad?
A. I knew it would come facing me.
Q. When did you first learn that?
A. I don't know,—when I was working on the track.
Q. Up until the time you went to work on the railroad a mont before your injury, you didn't know that?
A. No, sir.
Q. Where did you live before you went to working on the railroad
A. O, I lived south of town 9 miles and then north of town.
Q. How close did you live to the Erie track before you went t work on the railroad?
A. About 9 miles one place.
Q. How long did you live at your uncle Hecht's?
A. Not very long.
Q. Just a little before you went to work there?
127 A. I was there off and on a couple of months.
Q. And you didn't know until you went there to work tha the east bound trains kept to the south track and the west boun trains ran on the north track?
A. O, I knew they went on certain tracks but I didn't know which was which. I knew they didn't run together.
Q. Did you know that the morning you got hurt?
A. Why, yes, sir.
Q. When did you discover that?
A. I discovered that sometime when I was working on the track
Q. Every day that you went to work you would go up and dow that track?
A. Yes, sir.
Q. Now, *where* you trying to walk on the steel rails?
A. I was walking on the ties.
Q. On the ends of the ties or the middle of the ties?
A. I was walking on the middle of the ties.

Q. In the middle between the rails?
A. Yes, sir.
Q. Where did you commence to walk in the middle between the rails?
A. Right in the beginning.
Q. And you continued until you were hurt?
A. Yes, sir.
Q. When was it that you looked back?
A. When I went a little piece I looked back and didn't see nothing, and then I walked on a little piece and I seen the passenger train coming. I couldn't see nothing else. I walked along again and seen the passenger train coming and the engine passed me and the smoke came down over me and I couldn't see any more.
Q. The passenger train was coming from in front, wasn't it?
A. No, it was coming behind me. It was going east on the east bound track.
Q. Was it on the track you were on?
A. No, sir, I was on the west bound track and it was on the east bound track.
Q. Well, how long did it take you to walk over from the house to the track?
A. About 3 or 4 minutes.
Q. And before you got on the track you looked both ways?
A. Yes, sir.
128 Q. Why did you have to look both ways?
A. I looked to see if there was anything coming facing me,—I could see that,—and I looked back to see if there was anything coming behind me.
Q. After you got on the track going toward Summit, did you do that?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir.
Q. What did you look back for?
A. Trains come down there so fast I never like to walk beside a train and I was watching back of me.
Q. Looking for a train?
A. I was watching back, looking to see if there was anything coming. I looked to protect myself.
Q. How wide are those tracks apart?
A. I told you the ties are about a foot apart.
Q. Then that continued clear along, from the time you struck the track at Hecht's line till the time you got down to the point of injury, and yet you didn't see any train?
A. No, sir, the smoke was blowing down the track on my side from the passenger train.
Q. What was the use of looking back?
A. I kept looking back to see if there was anything coming. I looked back to be on the safe side.
Q. Was there anything unusual about the train or about the smoke?

A. It was awful black that morning.
Q. Was it unusual?
A. They were coasting down the hill and when they are coasting it is usually white smoke.
Q. When did you notice that it was unusual?
A. That morning.
Q. When that morning did you first discover unusual smoke?
A. When I looked back.
Q. If it was unusual, why didn't you get off the track?
A. He was firing the engine, it wasn't anything dangerous, but you can usually see through white smoke better than black smoke.
Q. You didn't find any fault with the engineer for firing his engine on the hill?
A. No, sir.
Q. He was attending to his business?
A. Yes, sir.
Q. And you were using the track for a walk way?
A. I was going to work.
Q. That was the way you were using it?
A. I was ordered to do it.

129 Motion to strike out the answer, sustained, exception.

Q. Who ordered you to do that?
A. The section foreman.
Q. To go down the track?
A. Yes.
Q. To walk on the track?
A. Yes, sir.
Q. Now, just state the language in which he said that.
A. I asked him how I should go to work and what time——
Q. I am asking you the language that he used.
A. I was just going to tell you. He told me to be on the job at 7 o'clock and to go down the track.
Q. Did he tell you which track to walk on?
A. No, he didn't tell me which track. He never gave me any information or nothing.
Q. When did he say that?
A. The morning that he hired me.
Q. When was that?
A. The first of December.
Q. Where were you hired?
A. I was hired at the Olivesburg road.
Q. Who was present?
A. Some of the section men were present.
Q. Name some of the men that were present when he hired you and told you to go down the track.
A. There was no one close to him, they were working down the track. He was standing at the top of the grade and I walked up to him and struck him for a job and he told me to be on the job at 7 o'clock Monday morning and to come down the track.
Q. Did he tell you to come down the track the morning of the 5th.

A. He told me once and he intended it for all time.

On motion of defendant the court instructed the jury not to consider the answer, to which plaintiff then excepted.

Q. I asked you whether he ever told you at any other time to go down the track?

A. No, he always thought I would remember that.

On motion of defendant the court instructed the jury not to consider the answer.

Q. He just told you once to go down the track and that was the morning he hired you?

A. Yes, sir.

Q. How far were the other men working from you and the foreman?

A. I don't know how many feet from me.

Q. Did he tell you there wouldn't be any trains on the track?

A. No, sir.

Q. So you went down the track because he told you?

A. I had orders to.

Q. Because he told you?

A. Yes.

Q. And you wouldn't go through the fields because the foreman told you to go down the track?

A. No, sir.

Q. If you had disobeyed the foreman you wouldn't have got the work, I suppose, would you?

A. No, sir.

Q. What kind of clothing did you have on that morning?

A. I had on overalls with a pair of pants on underneath.

Q. Did you have anything on your head?

A. Yes, sir.

Q. What was it?

A. A cap.

Q. Just an ordinary cap?

A. No, it had ear tabs on it.

Q. O, ear tabs?

A. Why, sure.

Q. Did you have them tied down?

A. No, I didn't have them tied down.

Q. Did you have them down?

A. Yes, I had them down.

Q. Was it the kind of ear tabs you pull down or stretch down over your ears?

A. It was a cap to pull down from the inside.

Q. Did it cover your ears good?

A. It came down pretty well, about to there (indicating).

Q. Do you swear it came down over the orifice or ear hole?

A. It came down about to there (indicating).

Q. So that you could easily hear?

A. Why, sure I could hear.
Q. Then what did the ear tabs have to do with it
A. The smoke from the east bound train kept me from seeing and detained the sound.
Q. Did the ear tabs have anything to do with it?
A. They kept me from hearing on the other side.
Q. The smoke was so strong that you couldn't hear the train?
A. No, I said the smoke kept me from seeing it and the east bound train passing me detained the sound of the engine coming so that I couldn't hear it.
Q. It whistled, didn't it?
A. No, sir. it didn't whistle.
Q. Didn't the engine whistle?
A. No, sir, there was no whistle at all.
131 Q. How did you expect to hear any of those noises when the train was dancing right along with it?
A. I didn't expect a train down there.
Q. Didn't you expect 14 to go east at that time?
A. That passenger?
Q. Yes.
A. Yes, I expected the passenger to go but I didn't expect no engine to go down.
Q. You saw the passenger?
A. Yes.
Q. And that attracted your attention?
A. No, I paid no attention to it.
Q. You wouldn't hear another train when that was roaring along, would you?
A. No.
Q. You knew that, when you were walking along you couldn't hear two trains at the same time?
A. Nobody would think there would be two coming at the same time.
Q. You couldn't hear them both at the same time? If you would hear one you wouldn't know whether it was one or two?
A. Certainly, you wouldn't think there was two coming.
Q. Now, when you saw no. 14 come, that came ahead of you?
A. That came behind me.
Q. And that was running on which track?
A. The east bound.
Q. And they were going east?
A. Yes, sir.
Q. And you were walking on the west bound track?
A. Yes.
Q. Now, did you see that train No. 14?
A. I seen the passenger train, yes.
Q. How far did you see it?
A. A little ways back of me, not very far.
Q. How far could you see on that track back?
A. About half a train length.
Q. How far do you say? About a car length?

A. About half a car length.

Mr. Kerr: That is not treating the boy right.

Q. How far could you see that train?
A. About half a train length back. It was right on the curve there.
Q. What is a half a train length?
A. Half a freight train.
Q. What is the length of a freight train?
A. About 30 cars.
Q. Do you know anything about the length of a car?
A. No, sir.
Q. Did the passenger train have a headlight on it?
A. It wasn't lit.
Q. Was it daylight then?
A. It was getting daylight.

Thursday Morning.

Q. You were so certain that you were starting away at 6:40 from your home, before putting your hat and coat on. Now, did you have your own watch?
A. Yes, sir.
Q. Was that standard or sun time?
A. Standard time.
Q. What time do you say it was when you got to the end of your uncle's lane where it crosses the railroad?
A. 6:45.
Q. How far was it from there to where you were hurt?
A. Along about ⅛ of a mile.
Q. What time was it when you got there?
A. About 6:50 or 6:55, along there.
Q. Which was it?
A. I don't know exactly the time, I didn't look at my watch.
Q. Wasn't that near where you expected to go to work?
A. Yes.
Q. Wouldn't you be interested in knowing whether you were on time or not?
A. I was there on time, I had till 7 o'clock to get there.
Q. Had you seen John Jennings that morning?
A. No, sir.
Q. Then it was not yet time to go to work?
A. I was going to get there on time. I would just about have been there on time.
Q. It wasn't yet time to go to work when you were struck by the engine?
A. Not quite.
Q. How near were you to old Summit when you were struck?
A. Not very far from it.
Q. How far?
A. About 300 yards.

Q. And it was old Summit you were going to reach that morning to go to work.

A. Yes, sir.

Q. So you had 300 yards yet to go before you would commence to work for the company?

A. Yes, sir.

Q. And you expected to get there at 7 o'clock?

A. Yes, sir.

Q. That was the time you were to begin your day's work for the Company?

A. Yes.

Q. Were you paid by the hour or were you supposed to put in each day for that pay?

A. We were to put in each day.

Q. How many hours?

A. We were supposed to put in 9 hours then.

Q. Then your service would begin at 7 o'clock?

A. Yes, sir.

Q. And the time you used in going to and from your work you were not paid for,—do you mean to say that?

A. No, sir.

Q. You were not?

A. No, sir.

Q. So that, up to that time, to 7 o'clock, you had nothing to do, nothing that you were required to do by the Company?

A. We was supposed to get the tools out as soon as we got there so that, when the rest of them got there——

Q. You wouldn't do that till you got where the tools were?

A. No, sir.

Q. So that, up to the time you got to where the tools were, you had nothing to do that was required by the Company?

A. Nothing only to be there on time.

Q. You had no other requirement of the Company but to be at your place at 7 o'clock to commence work?

A. No, sir.

Q. Now, where were those tools kept that you speak of?

A. They were kept right over the bank at Summit, just throwed over the bank toward the fence.

Q. What kind of tools were they?

A. Picks, shovels, crowbars and jacks.

Q. What kind of a car did you use for your section?

A. We had an electric car and we had a little push car that
134 we hauled our tools on.

Q. You used the electric car to ride on and another kind to haul the tools on?

A. Yes, sir.

Q. How would you keep the tools from day to day?

A. When we had them where we were working, at night we would throw them over the bank.

Q So that a tramp or anybody could get them?

A. The boss said throw them over there and we throwed them over.
Q. And they would be left lying over the bank till the next morning?
A. Yes, sir.
Q. What was done with the tools on the evening of the 30th of December, that night?
A. They were taken to Pavonia.
Q. What was done with them on the 31st?
A. We weren't doing anything that day, that was Sunday.
Q. What was done with them on the 1st of January?
A. Ran them up to above where the old tower used to stand.
Q. And what was done on the night of the second of January?
A. I wasn't working that day.
Q. On the third of January, what was done?
A. We throwed them over the bank.
Q. And on the night of the 4th?
A. Throwed them over the bank.
Q. Where did you work on the 30th of December?
A. Below Summit a little piece.
Q. Do you mean betwixt Pavonia and Summit?
A. Yes.
Q. Do you know where you worked on the 31st?
A. Didn't work at all, that was Sunday.
Q. Now, on the 1st of January, where did you work?
A. Worked right up in front of Jenning's house above the Summit.
Q. That was west of Summit?
A. Yes.
Q. Do you remember where you worked on the third?
A. Yes.
Q. Where?
A. Down just below Summit a little ways.
Q. Do you mean west?
A. East.
Q. How far?
A. Just a little piece below, about 100 ft.
135 Q. On the 4th where did you work?
A. At the same place.
Q. Who worked with you?
A. John Jennings, Ray Jennings, Herman Foraker, Cooney Arnold and three or four foreigners, I didn't know their names.
Q. You kept the motor car down at Pavonia?
A. Yes.
Q. When you quit work, you would remove that from the track, would you not?
A. We would put it on the track and the men going to Pavonia would get on and ride and we that were going the other way would walk.
Q. And when you got it to Pavonia, what did you do with it?
A. The boss at Pavonia would put it in the car house, I suppose.

Q. Did you ever help?
A. No, sir.
Q. Did you ever help move it?
A. I helped to get it on the track at the place where we were at work.
Q. How many men would it take to get it off and on the track?
A. Four men could do it and six men could do it easier.
Q. As far as the Company was concerned, as you understood it, it made no difference to them when you left home?
A. Just so we were there on time.
Q. Just so you were there at 7 o'clock in the morning, at the place to work?
A. Yes, sir.
Q. Do you know whose signature that is to the bottom of this petition?
A. That is not mine, that is P. W. Hecht's.
Q. Were you there when he signed it?
A. No, sir.
Q. He was your uncle, wasn't he?
A. Yes, sir.
Q. Did you talk to him about the case after you were hurt?
A. No, sir.
Q. Never talked to him about it?
A. No, sir.
Q. And did you talk to Mr. Kerr?
A. I never seen Mr. Kerr till last March a year ago.
Q. That was March, 1912, was it?
A. No, sir, 1913.
Q. Last March would be 1913, a year ago last March would be 1912.
A. No, I am beginning from 1914, a year back from that would be 1913.
Q. So you never saw Mr. Kerr till March, 1913?
A. No, sir.
136 Q. Didn't you see him before this suit was brought?
A. No, sir.
Q. Who did you send to talk to him?
A. I didn't send anybody. My uncle just came in and brought the suit against the Company.
Q. Didn't you authorize the suit?
A. He was my guardian, he was doing what he thought was best for me.
Q. He did that?
A. Yes, sir.
Q. You didn't talk to your guardian ad litem about what had occurred?
A. No, sir.
Q. When did you first see the petition that he signed?
A. I believe it was yesterday.
Q. Was that the first time?
A. Yes.

Q. Now, you signed this paper, the reply that was filed in 1914?
A. Yes, sir.
Q. Byron B. Marrietta?
A. Yes, sir.
Q. You talked to Mr. Kerr before you signed that, didn't you?
A. Yes, sir.
Q. Didn't you ever read over the petition before you signed that?
A. Yes, sir.
Q. You read over this paper (the petition) before you signed the reply?
A. No, I believe Mr. Kerr read that to me.
Q. And then he read the answer?
A. I read the answer.
Q. The amended answer?
A. Yes, sir.
Q. And then you read this paper, the reply?
A. Yes.
Q. And signed it?
A. Yes.
Q. And you read the answer?
A. I read the answer and he read the petition.
Q. You read the answer that they filed?
A. I read the answer.
Q. Didn't you have the answer read to you?
A. I read the answer.
Q. You read the answer that the Railroad Company put in, did you?
A. I think so.
Q. This is signed by Mr. McBride, did you read that one?
A. No, sir, Mr. Kerr may have read that to me, I am not
137 sure.
Q. How did you know it wasn't true if you didn't read it?
A. Well.
Q. I will show you this paper here and ask you whose signature that is.
A. I don't know, it is my name but I didn't write it .
Q. Who wrote it?
A. I couldn't say.
Q. Didn't you write your name to that?
A. I don't think so.
Q. Will you say you didn't?

Mr. Kerr: What paper is it?

Q. Is that your signature?
A. I don't think it is.
Q. Will you say it is not?
A. I will say it is not.

Counsel for plaintiff objected unless the witness knows what the paper is: overruled; exception by plaintiff.

Q. You weren't present when that was signed?
A. I don't think so.
Q. Will you say you were not?
A. Yes, sir.
Q. Will you swear that is not your signature, the words "Byron Marietta" there?
A. Yes, sir.
Q. Do you know Mr. Quick?
A. Yes, sir.
Q. Here is another place down here, did you sign that?
A. I don't think so.
Q. So there are two signatures on this paper, one is Byron Marietta and the other is Byron Marietta,—do you say that you didn't write them?
A. I don't think so.
Q. Will you say you did or did not?
A. I will say I did not.
Q. You do remember a man named Quick?
A. Yes, sir.
Q. Did he ever talk to you?
A. He was out to the farm, the claim agent.
Q. Didn't he write this paper and show it to you?
A. No, sir.
Q. Didn't he tell you that he had written the paper?
A. No, sir, he was a stranger to me.
Q. He was a stranger to you?
A. Yes, sir.
Q. Have you ever seen him since?
A. I saw him yesterday.
Q. Didn't he present you a paper?
A. No, sir.
Q. Now, you do say that you signed this one that is called a reply, that is your signature there?
A. Yes, and they don't look alike.

138 Judge Wolfe: I will ask the stenographer to mark this paper "Defendant's Ex. A."
Mr. Kerr: I ask to see the paper.
Court: You are entitled to see it if it is offered in evidence.

Redirect examination:

Q. Do you know approximately how fast this passenger train was running down the east bound track?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. It was running between 30 and 40 miles an hour.
Q. Did you observe the speed of trains when you were working on the section?
A. Yes, sir.
Q. I will ask you whether this engine that was coming down

there gave any signal, or what signal, if any, it made by bell or whistle or otherwise, when it approached.

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. It made no whistle, no sound of the bell or anything.

On motion of defendant the answer was stricken out.

Q. I will ask you to state, as this engine approached, and just prior to the time you were struck, whether you heard any signal by bell or whistle from the engine.

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. No, sir.

Q. I will ask you to state what instructions, if any, or warning, were given you by the section boss there as to the danger from trains, when you went to work, or at any time while you were working.

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. There was none.

Q. What do you say about what instruction or warning
139 was given to you about approaching trains?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. I got none.

Q. I will ask you to state how near, if you were standing or walking in between the tracks, at the point where you were run over, how near that would bring you to a train passing on either track.

A. There wouldn't be much room for a man to stand between the tracks, if a train was passing either way.

To which answer defendant objected.

Court: If you will have him give the distance between the tracks, it will be a question for the jury.

Objection sustained and answer stricken out; exception by plaintiff.

Q. I will ask you to state what your idea was in walking down there, as to whether it was safe or otherwise to walk between the tracks with trains passing.

To which question defendant objected, the court sustained the objection and plaintiff then excepted, offering to prove that it was dangerous to stand between the tracks when a train was passing.

Q. What was the section boss's name?

A. William Kyle.

Q. Do you know whether he is still section boss on that road?

A. I think he is.
Q. Do you know where he lives?
A. North of Pavonia.

Recross-examination:

Q. You didn't notify the people on the coming train that you were going to stand on the track while they passed, did you?

Objection; overruled; exception by plaintiff.

A. Why, no.

Motion by plaintiff to strike out the question and answer; overruled; exception by plaintiff.

Q. You didn't did you?
A. No sir.

140 PHILIP W. HECHT was introduced as a witness on behalf of the plaintiff and, being first duly sworn, was examined by Mr. Kerr and testified as follows:

Q. State your name.
A. Philip W. Hecht.
Q. How are you related to Byron Marietta, the plaintiff here?
A. My wife is an aunt of his.
Q. Where you at one time his guardian?
A. Yes, sir.
Q. Where do you live?
A. 5 miles northeast of here.
Q. Where did you live at the time that Byron received the injuries complained of here?
A. That is where I still reside.
Q. At the same place?
A. Yes.
Q. Where is that farm located with reference to where the Erie Railroad runs along there?
A. Well, the railroad runs through the farm.
Q. How many tracks are there through the farm?
A. Two of them.
Q. I will ask you to state where you were about 7 o'clock on the morning of January 5th, 1912?
A. I was at home at the barn.
Q. How is that barn located with reference to the railroad, how far away or at what elevation?
A. Well, it is about ⅛ of a mile, as near as I can judge, from the railroad.
Q. How is the view from your barn down to the railroad?
A. It is rather sloping.
Q. Which is the higher point, the railroad or the barn?
A. The barn.

Q. Is there anything between that and the railroad that would obstruct the view?
A. No, sir.
Q. Now, on the morning in question, I will ask whether you saw a passenger train go east on one of the tracks.
A. Yes, sir.
Q. About what time was that?
A. Well, as near as I could judge, it was between 6 and 7 sun time.
Q. Did you take notice of the train as to its speed?
141 A. Well, it was running at a pretty good speed.
Q. Have you seen trains passing along so that you would know the speed of trains?
A. Well, some of them speeds up at a pretty good rate.
Q. Well, what do you say, how fast do you say this passenger train going east was running?

Counsel for defendant objected to testimony as to the speed of the passenger train for the reason that it is immaterial; but the court overruled the objection and defendant then excepted.

A. Well, I would judge about 40 miles an hour.
Q. Now, did you see anything on the other track at that time, as the train was passing?
A. Yes, sir.
Q. What was that?
A. There was a freight train going up the hill and it had stopped on its way up.
Q. When the passenger train was going along, what did you see on the other track?
A. An engine.
Q. Where was it running with respect to the passenger train?
A. It was running with the passenger train east.
Q. On which track was it running?
A. On the west bound track.
Q. Running the same direction as the passenger train?
A. Yes.
Q. How fast was it running, as near as you can state?
A. Well, it was running at the rate of the passenger train.
Q. Go on and state what you saw after that, how long did you look?
A. Well, I kind of stood and watched there. I seen the engine go with the passenger train and pretty soon it came back again with a freight train.
Q. When it came back up, which track was it on then?
A. On the west bound track.
Q. How long had it disappeared before it came back again?
A. I don't suppose it was over 15 or 20 minutes.
Q. Did you know at that time that anything had happened to Byron?
A. No, sir.
142 Q. When did you learn it for the first time?
A. It was half past eight sun time.

Q. Where did you get the information from?
A. Mr. Jennings' boy brought the news to us.
Q. Now go on and state, after this engine came up after going down, what was done and what you observed there.
A. I seen it stop there and I seen men walk around and after while everything was all quiet and it bent back and got its train again.
Q. Which way did it go?
A. It went east after the train and then it came back up again.
Q. What track did it go on then?
A. It came up the west bound track.
Q. Where was the freight train that you saw go up afterward, where was it during this time?
A. It was standing right there at the grade.
Q. Do you know where there is a brick house there on the north side of the track?
A. Yes, sir.
Q. Where was it with reference to that?
A. The caboose was about even with the house.
Q. How is the road there as to being straight or otherwise, at the point where the boy was run over? Did you learn the place afterward?
A. Yes, sir.
Q. How is it as to being straight or otherwise?
A. It is a curve.
Q. How is it as to where that little cut is there?
A. It was only a little piece.
Q. I will ask you whether you could see from where he was hunt around to where that brick house is.

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. I don't understand.
Q. How from where you understood the boy was struck with the engine, how far west can you see up the track?
A. Well, we can see very near to the old tower.
143 Q. I mean from the point where he was hit, can you see around to the brick house?
A. O, no, sir.
Q. Now, when you learned that the boy was hurt, did you go down the track or did you go somewhere else?
A. I came into Mansfield.
Q. What brought you into Mansfield?
A. To see how seriously he was hurt.
Q. Did you learn that he was brought in here?
A. Yes, sir.
Q. Where was he when you saw him in town?
A. He was at the hospital.
Q. Emergency hospital?
A. Yes.
Q. Where was he when you saw him?

A. They had just got him to bed.
Q. Could you see how he was?
A. He was in bed and he was pretty badly used up about the head:

On motion of the defendant the latter part of the answer was stricken out.

Q. Did you see him at the hospital when you went there in the morning?
A. Yes, sir.
Q. And you say he was in bed?
A. Yes, sir.
Q. Did you see his appearance, how he looked?
A. Yes, sir.
Q. What did you notice, if anything, as to his head?
A. He had his head bandaged, I believe.
Q. Did you afterward see anything about his head, at the hospital or at any time?
A. Yes, he had a big gash in his head.
Q. Whereabouts was it?
A. Across his head here.
Q. How long, about?
A. Well, I judge at least 4 inches anyhow.
Q. Now, I will ask you, as that engine came down along by the passenger train, whether any signal was given by bell or whistle by the train.

Objection; sustained; exception by plaintiff, offering to show that he was looking at the train when it went down and that it neither whistled -or rang the bell.

144 Q. Now, I will ask you to state, when you were looking at that engine coming down, whether you heard or saw any signal, by whistle or bell, from the engine.

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. No, sir, I did not.
Q. Mr. Hecht, in your experience, did you ever observe on a cold morning what appearance there would be of an engine whistling?
A. Yes, sir.
Q. What was it?
A. Steam.
Q. Now, I will ask you to state whether, in looking at this engine when it went down there, you saw any steam coming from the whistle?
A. No, sir.
Q. Now, going back to the boy, do you know how long he remained at the hospital?
A. Why, ten weeks.
Q. Were you to see him during that period?
A. Yes, sir

Q. How frequently did you go to see him?
A. Well, on an average of twice a week anyhow.
Q. Now, at the end of that time where did he go?
A. He came to my place.
Q. How did he come there?
A. He was taken out in the ambulance.
Q. Were you there when he got there?
A. Yes, sir.
Q. What was done with him after he got to your house?
A. He was carried into the house and we put him to bed.
Q. How long did he remain in bed before he was up, after he he came to your house?
A. Well, he was in bed all of six weeks.
Q. After he got to your house?
A. Yes, sir.
Q. Tell the jury, in your own way, how he first got up and what was done, if anything, after he got out of bed.
A. Well, we would have to carry him back and forth wherever he wanted to go, and we had to wait on him like a child. He wasn't able to handle himself at all.
Q. How long did that continue that you had to help him?
145 A. Well, that was for pretty near three months.
Q. Then, after that time, how would he get around? Just explain.
A. Well, he thought he could get around by the use of crutches and I got him a pair and——

Objection.

Q. Just go on, what did he do?
A. He walked upon the crutches by a little aid till he got used to them. I think it was pretty near three or four months before he could use his crutches right.
Q. From that time to this time, as far as you saw him and knew him how has be got around?
A. With crutches.
Q. Has he done any work that you know of? If so, state what it was, while he has been with you?
A. No, sir, he didn't do any work.
Q. How has he walked? Do you know how he walks now?
A. Yes, sir.
Q. How did he walk from the time he got used to his crutches every time you would see him?
A. Well, he would support himself on one foot and his crutches.
Q. What about one leg?
A. Well, one is shorter than the other.
Q. In the ordinary movements around, how does he carry that when you see him?
A. Well, that is always up off the ground.
Q. Now, do you know of anything that happened to his collar bone after he got out to your house?
A. Yes, sir.

Q. I wish you would state to the jury what there was about that and how it was done.

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. He broke it turning over in bed.

Counsel for defendant moved that the answer be stricken out but the court overruled the motion and defendant then excepted.

Q. What was done about that?
A. The doctor reset it again.
Q. Who was the doctor?
A. Dr. McCullough.
Q. Do you know of anything happening after that?
A. Yes, he broke it over again after that.
Q. What was done about that?
A. There wasn't anything done.

146 Counsel for defendant moved that the answer of the witness that he broke his collar bone the second time be stricken out, but the court overruled the motion and defendant then excepted.

Q. Do you know Byron's age?
A. Yes, sir.
Q. How old was he when this occurred?
A. 19 years of age.
Q. That was two years ago in January?
A. Two years the 5th of January.
Q. Do you remember the kind of weather it was at that time?
A. Yes, sir.
Q. What was the state of the weather?
A. It was very cold.
Q. How was it as to any wind?
A. Yes, sir, there was wind.

Cross-examination by Judge Wolfe:

Q. What kind of a train was it that you saw going east that morning?
A. It was a passenger train.
Q. Wasn't it what we call the Wells-Fargo Express?
A. Well, now, I couldn't say that.
Q. Don't you know there were two trains going east, one about 7 and the other considerably earlier?
A. There was two always went down in the morning, that's all I could say.
Q. Well, if it was the passenger train, it couldn't have been going down there at 7 o'clock, you know that, don't you, railroad time?
A. I don't know.

Q. Don't you know what time the passenger train usually went down?

A. Well, I judged that it was between 6 and 7 o'clock going east.

Q. What kind of time are you speaking about?

A. Sun time.

Q. Isn't it due at Mansfield and has been for years at 6:55? Don't you know that?

A. No, I don't.

Q. You never knew it to go down ahead of time, did you, an Erie train?

A. I don't know.

Q. Or any other train ahead of time. What time was it you thought that train went down?

A. Between 6 and 7 o'clock. I had no time piece with me to time it.

147 Q. That was sun time?

A. Yes, sir.

Q. Was the sun up?

A. Well, now, I couldn't say as to that.

Q. What is your best recollection?

A. What is it you want to know?

Q. Just what I asked.

A. You asked whether the sun was up. I couldn't say whether it was up or whether it was cloudy. It was probobly up but it must have been covered.

Q. Do you say the sun was up?

A. It was sun-up time.

Q. Was the sun up that rises in the east? Was it up yet when you saw the train go by?

A. It was time for it to be up.

Q. Well, was the sun late that morning?

A. I don't think it was.

Q. Was it a clear or cloudy morning?

A. Well, now, I couldn't answer that, whether it was clear or cloudy.

Q. Don't you remember that morning?

A. I remember that morning, sure.

Q. And you went out and look- at the train going by?

A. Yes, sir.

Q. Well, you saw the passenger train, as you call it, going by, going east?

A. Yes, sir.

Q. Between 6 and 7,—now how near 7 was it?

A. Well, I couldn't just state exactly.

Q. You won't say whether it was after 6:50 or at 6:50?

A. No, sir.

Q. You speak of the track,—how far could you see from the old tower looking along westward on the track? You know where the old tower was?

A. Yes, sir.

Q. How far do you say you could see from the old tower?

Objection; overruled; exception by plaintiff.

A. Do you mean standing at the old tower and looking west?
Q. Yes, standing at the old tower on the line of the track, how far west could you see up the track?
A. I don't think you could see much over 40 or 50 rods.
Q. How much over do you say?
A. I won't say how much over, not very much.
Q. Did you try it?
A. Well, now, I didn't just really, but I believe, though, a man could see about that distance, because it is on a straight
48 line there.

Q. Standing at the place that was pointed out where Marietta was hurt, how far from the old tower was that?
A. Well, I don't suppose that was much over 20 rods.
Q. If you would stand there and look west, how far could you see?
A. Well, you couldn't see very much further.
Q. How much further? Could you see 100 rods there?
A. No, sir.
Q. Do you say you could see 75 rods?
A. No, sir.
Q. There are two tracks?
A. There are.
Q. If you would stand in the middle of the two tracks, how far could you see?
A. You couldn't see on account of the curve.
Q. If you were standing on the north track you could see farther than if you were standing on the south track?
A. You might.
Q. Does the curve recede to the left?
A. When you look east?
Q. No, west?
A. Yes, it curves.
Q. Does the curve go to the right hand when you stand at the tower and look west or does it go off to the left hand?
A. It goes to the right looking west.
Q. Where could you see furthest standing on the track?
A. Well, you can't see very much further, you might see a few rods further.
Q. Aren't you mistaken about the curve? When you are standing there looking west, don't the curve shoot off that way, (to the left) and if you saw a train coming, wouldn't it be coming from down that way, coming toward you?
A. Yes, sir.
Q. That's the way a train would come?
A. Yes.
Q. Then you could see further if you were standing on the north track than you could if you were standing on the south track?
A. Yes, you could.
Q. Then, how far could you see standing on the north track?

A. Well, we will make it 10 rods further.
Q. From where he was hurt?
A. Yes.
Q. Then, standing at the old tower, on the north track, how fa west could you see up the track?
A. Well, make it about 30 rods.
149 Q. Didn't I ask you first how far you could see from th tower and didn't you say 40 or 50 rods?
A. Yes, sir.
Q. Then didn't I ask you how far it was from the old towe to where the young man was hurt?
A. Yes, sir.
Q. And you said about 20 rods?
A. Yes.
Q. And didn't I ask you how much further you could see from where he was hurt looking west from there and you said not much further?
A. Yes, I said you couldn't see much further than 40 rods.
Q. Does a train come right around the elbow there, just square around?
A. No.
Q. There is a slight curve there, isn't there?
A. Yes, sir.
Q. Where is it with reference to this map? Where is your farm here?
A. (Pointing to the map.) *A*. Right there.
Q. Now, the lane is here some place?
A. Yes, sir.
Q. Where is the tower?
A. The tower would be down here.
Q. How far is it from where the tower is to this stiff curve represented on the map here?
A. Well, I guess that would be 40 rods.
Q. Do you think that, standing on the north track, you couldn't see any farther?
A. I gave that as standing on the north track.
Q. You do know there are two trains running in the morning pretty close together, like passenger trains?
A. Yes, sir.
Q. You don't know whether this was the first or the second?
A. This was the first.
Q. It went past there about sun up?
A. Yes, sir.
Q. Now, what train, when you went out first that morning, did you see?
A. I saw a freight train.
Q. That was going which direction?
A. West.
Q. How many freight trains did you see?
A. I just seen that one at the present time.
Q. Well, if you saw more, when did you see them?

A. There was another one coming.
Q. What time was that?
A. That was right after this train.
Q. How long afterward?
A. Well, as quick as they got their engine coupled on.
150 Q. When you saw that train, where did you see it?
A. Down the railroad going west.
Q. Was it across your driveway across your farm?
A. Yes, sir.
Q. It had reached that?
A. Yes, sir.
Q. Did you see Marietta that morning?
A. No, sir.
Q. You didn't see him that morning at all?
A. Yes, I seen him go to work, I didn't speak to him.
Q. When did you see him go to work?
A. He left at 6:30 sun time.
Q. How do you know?
A. That was his time of leaving.
Q. Do you say he left the house at 6:30 sun time that morning?
A. Yes, sir.
Q. Did you look at your watch to see the time he was leaving?
A. I didn't just look at the time but that was his time of leaving.
Q. He left at that time just as he left at other times?
A. Yes, sir.
Q. Left at 6:30 sun time?
A. Yes, sir.
Q. That would be just 6 o'clock standard time, wouldn't it?
A. Yes.
Q. Now, don't you know that he didn't go at 6 o'clock?
(Witness did not answer).
Q. How soon after that did you see that freight train?
A. Well, the freight train was going up as he was ready to step on the track.
Q. Now, what part of the train was going past the curve when he was ready to step on the track,—was it the middle or the rear or the front that was passing there?
A. It was the rear of the train.
Q. You say he came up to the track just as the rear of the train ran along there?
A. Yes, sir.
Q. Did you see him going up to the track along that part of the road just as the train was going over?
A. Yes, sir.
Q. Is that the only time you saw him there?
A. Yes, sir, he was over to the railroad then.
Q. Was that the only time you saw him going on the track in the morning as he went to work?
151 A. At any time?
Q. Yes.
A. Well, at any time I took notice of him.

Q. How often did you take notice?
A. Pretty near every morning.
Q. Pretty nearly every morning you saw him go to the track and go east on the track.
A. Yes, sir.
Q. And you saw him on the morning of the 5th of January?
A. Yes, sir.
Q. What kind of a train was that? Describe more fully.
A. It was a freight train.
Q. How long was it?
A. Well, I couldn't just say how long it was.
Q. How was it equipped?
A. Well, it was a lot of cars hooked together and an engine in front pulling.
Q. Was that all you saw?
A. An engine behind pushing.
Q. We call that a combination?
A. Yes.
Q. And it was going west on the track?
A. Yes.
Q. And he was just approaching the track, going up to it, as the engine that pushed went on to the west?
A. Yes.
Q. How fast was that going?
A. It was going very slow.
Q. How fast?
A. Well, it wasn't going more than ten miles an hour I don't suppose.
Q. Do you call that very slow?
A. I do.
Q. Was it up grade or down grade?
A. Up grade.
Q. A good deal up grade, wasn't it?
Q. Had you seen that train at any other time working up grade?
A. After that?
Q. No, before that.
A. No, sir.
Q. No freight train ever worked up that grade with a combination of engine in front and engine in the rear?
A. Yes, I have seen them at different times.
Q. When?
A. Well, I can't say just when. I have seen such trains at different times.
Q. Did you see it often?
A. Yes.
Q. It was quite a custom to do that?
A. Yes.
Q. It would run up to the top of the hill and the engine would detach and come down again?
152 A. They would generally go clear up the hill.
Q. Well, it would go up and come down again.
A. Yes, sir.

Q. Where did they get the engine?
A. They would take if off a train behind.
Q. Do you say that is the way they did it?
A. I think that they done that.
Q. You have seen them leave the train behind and use the engine to push a train up the hill?
A. Yes, sir.
Q. And then it would go back and hitch on and carry its own train up the hill?
A. Yes, sir.
Q. That is what you have seen done?
A. Yes, sir.
Q. And that's what they were doing that morning?
A. Yes, sir.
Q. That's what they were doing when you looked over there?
A. Yes.
Q. And you knew then that they were doing that?
A. Yes, sir.
Q. Did you ever talk to your nephew on the subject of their doing that?
A. No, sir, I don't know as I ever did, to my recollection.
Q. Did Byron ever talk anything about it?
A. No, sir.
Q. Now, which did you see first, the passenger train that you mentioned, or the freight train, that morning?
A. The freight train.
Q. How far had Byron walked or gone to the place that you have had pointed out as the point where the accident occurred, after he got on the track and was struck, how far was that distance?
A. Well, it was probably 50 or 60 rods, may be a little further.
Q. Would it be 70 rods?
A. Yes, I would say it might be 70 rods.
Q. Was it more than that?
A. Well, we will say 80 rods.
Q. How far was it from your driveway to the old Summit?
A. Well, I judge it would be 100 rods.
Q. You saw Byron step on the track just as the rear freight engine passed?

Objection—He didn't say that.

Q. Did he step on instantly or not?
A. I couldn't say that.
Q. You saw him?
A. I saw him walk on the track.
Q. Just after the track was cleared, you saw him walk on the track?

A. Yes, sir.

153 Q. How far up the track did the train go before it disconnected with the engine?
A. Well, I don't suppose it went——
Q. What do you know?

A. I don't think it went over 60 rods.
Q. How soon did the passenger train come in sight?
A. Well, as they got up to where they stopped, the passenger trai was coming.
Q. Coming from where?
A. Coming from the west and going east.
Q. Where were you standing at that time?
A. Standing at my barn.
Q. How far from the track?
A. About ⅛ of a mile.
Q. You saw the freight train disconnect and the engine bac down, did you?
A. Yes.
Q. Where was the passenger train when you saw that?
A. It was just along side up there. As the passenger train wa coming east, the engine was disconnected and followed it right back
Q. Now, which came first, the passenger train or the engine?
A. The passenger.
Q. How much first?
A. If I recollect, it came along with the hind coach, as near as I can remember.
Q. Did they disconnect the engine there and back down?
A. The engine disconnected from the freight train and started right back.
Q. Were you close enough to see the operation of the drawbars?
A. No, I couldn't see that but I seen the engine draw back.
Q. How far was it from you when it started to draw back?
A. ⅛ of a mile.
Q. How far was that from the point where your private lane crossed?
A. Well, that was about 60 rods.
Q. Which way was it from there that the engine disconnected?
A. West.
Q. In January, 1912, what did you have in the field lying toward the railroad and east of your drive, what was it cropped in, if anything?
A. Hay crop.
Q. Was it meadow all over the field clear to the railroad?
154 A. Yes, sir.
Q. How many fields were between your barn and the railroad?
A. One field.
Q. How many acres?
A. 12 acres.
Q. How far east did that field extend along the right of way from this drive of yours east along the railroad?
A. I think about 60 rods.
Q. Did that go as far as Byron was hurt?
A. No, sir.
Q. Is there another field there?
A. Yes, sir.
Q. What was in that field?

A. That was a pasture field.
Q. Is that all cleared land through there?
A. Yes, sir.
Q. Pretty good land?
A. Pretty fair.
Q. Is it cut up much?
A. There is a ditch running through.
Q. A drainage ditch?
A. Yes, sir.
Q. Where is that?
A. That runs north.
Q. How many fields are there between the right of way and your barn?
A. It is just one field.
Q. Does the second field extend east of where Byron was hurt?
A. Yes.
Q. Was he hurt beyond your land?
A. Yes.
Q. What kind of a field is that second field?
A. It is a meadow.
Q. Was that cleared and in pretty good condition?
A. Yes.
Q. How much of a ditch was there through this first field?
A. Well, just surface water.
Q. Is it deep, with great, precipitous sides, or could you just step over?
A. Just step across.
Q. Did you cross that when walking down that way?
A. Yes, sir.
Q. Do you go to Pavonia that way sometimes?
A. I go straight down through the field to the railroad.
Q. Just cut across through the fields to the railroad?
A. Down the driveway that crosses the railroad.
Q. You say you cut across the fields on the way to Pavonia and struck over to the railroad there some place?

Objection.—He didn't say that.

155 A. No, sir, I said I went on the driveway to the railroad.
Q. Now, in January, 1912, what was there in the way of walking across the fields, if you would go from your barn to old Summit?
A. I don't know as there would be anything.
Q. Can you see from your barn or house across to old Summit?
A. Yes.
Q. Was there a building there or tower at old Summit?
A. Yes, sir.
Q. Could you see that from your house?
A. We could see it from the barn.
Q. How far is your barn from the house?
A. About 4 or 5 rods.
Q. The barn is in line from your house to old Summit, isn't it?
A. Yes, sir, you would have to go just below the barn to see it.

Q. The barn stands in the way of seeing it from the house?
A. Yes, sir.

Redirect examination:

Q. There is some timber between your house and barn and wh they call old Summit, isn't there?
A. There is a woods east of us.
Q. Is that between your house and barn and what they call O Summit?
A. It just runs to the corner of the field.
Q. Does your land come down to the Summit or where it us to be?
A. No, sir.
Q. Was there any way by which this young man could have go across your land and got there?

Objection; sustained.

Q. Your land don't extend down there?
A. No, sir.
Q. Whose land, if anybody's, is between this place and your plac
A. Samuel Pugh's.
Q. Is there any road of any kind that goes to that place calle Old Summit?
A. No wagon road, no, sir.
Q. You say you have lived out there how many years?
A. 5 years.
Q. Have you observed how the section men that live along th tracks go to their place of work along the section?

To which question defendant objected, the court overruled th objection and defendant then excepted.

156 A. They always walk along the railroad.
Q. How long has that been going on to your knowledge from your observation?

To which question defendant objected, the court overruled th objection and defendant then excepted.

A. As long as I lived there.
Q. And how many men, in the immediate vicinity of your place lived along the track at that time?
A. Well, there was an average of four that went steady.
Q. Do you remember somebody living in a brick house on th other side there?
A. Yes, sir.
Q. Who lived there?
A. Mr. John Jennings.
Q. Anybody else live there?
A. His boy.
Q. Did you observe how they went down to their place of work on the section?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. They walked the track.
Q. And that has been as long as you lived there?
A. Yes, sir.

To which question defendant objected, for the reason that it was leading, and moved that the answer be stricken out, but the court overruled the objection and motion and defendant then excepted.

Recross-examination:

Q. Could you see from your barn to the John Jennings home?
A. Yes, sir.
Q. Is the railroad a little lower than your barn?
A. Yes, sir.
Q. Is the Jennings place higher than the railroad?
A. It is just about even with the railroad.

Redirect examination:

Q. Did you ever notice whether there was any way or walk from the Jennings house out to the railroad?
A. There was a path.
Q. Where does that path run from and to?
A. From the railroad to the house.
Q. Is there any wagon road that that path runs to?
A. There is an alleyway where they go down into the road.
Q. Does that path lead to any public road, the path that comes out of the Jennings house?
A. It leads to the railroad.
Q. Does it lead to any public road?
A. No, sir.

Re-recross-examination:

Q. Is there a public road at Old Summit?
A. No, sir.
Q. Were you ever there with a wagon?
A. No, sir.
Q. You never drove down the track with a wagon then?
A. No, sir.

MILTON ROBINSON was introduced as a witness on behalf of the plaintiff and, being first duly sworn, was examined by Mr. Kerr and testified as follows:

Q. Your name is Milton Robinson?
A. Yes, sir.
Q. Where do you live?
A. In Weller Township.
Q. Where do you live with respect to the place where P. W. Hecht lives?
A. North.
Q. Is your farm directly north of his farm?

A. Just about, yes, sir.
Q. Do you know where the tower was at Old Summit?
A. Yes.
Q. Who owns the land there?
A. Mr. Pugh.
Q. Is there any public road that leads in to where the old tower was?
A. No, sir.
Q. How long have you lived up there?
A. About 22 years, I believe, at that place.
Q. Did you observe, during that time, how the section men that lived along the track got to their place of work, as far as you could see?
A. Yes, sir.
Q. How would they do that?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. Mr. Jennings lives west and has lived there 7 or 8 years and he goes up and down the track. Still further west Arnold goes up and down the track.
Q. Any others?
A. There is a man that lives up west there that comes down the track.
Q. And that has been going on there as long as you have lived there practically?
A. Yes, sir.
Q. Now, do you remember about the 5th of January, 1912, when it is said this young man was injured?
A. Yes, sir.
Q. Where were you on the morning of that day along between 6 and 7 o'clock?
A. I was at home.
Q. Your house is on the north side of the railroad?
159 A. Yes, sir.
Q. From your place can you see over to the point where it is said this young man was hurt?
A. Yes, sir.
Q. I wish you would state to the jury what you saw that morning, especially about the passenger train going east and any other kind of train that you saw.
A. Well, I saw the passenger train going east and I saw the engine backing down.
Q. Where was the engine with regard to the train?
A. Well, the passenger train was, I think, a little bit ahead of the engine, not the whole train but the big portion of the train was ahead of the engine.
Q. Was the engine backing down alongside of some part of the train?
A. Yes, sir.
Q. I will ask you whether you heard, as the engine came down

about where it has been said the boy was run over, whether you
rd any signal by bell or whistle of the engine.
A. No, I don't believe I did.
Q. Did you look at the engine as it came along?
A. I just noticed it, I didn't look very particularly.
Q. Did you ever notice anything on a cold morning when the
gine whistles?
A. You can see the steam.
Q. Did you see the steam coming out of this backing engine as it
me along?
A. I didn't notice any.
Q. When did you first learn that this boy was hurt?
A. About 3 o'clock.
Q. On that day?
A. Yes.
Q. Did you go up to see the place afterward?
A. No, sir.

60 Cross-examination by Mr. McBride:

Q. You say you saw Mr. Jennings and some of the other section
en going to work and walking down the track—where did they
lk to?
A. They generally went to Pavonia or to the tower.
Q. They mostly went to Pavonia?
A. I guess, unless they were working up at this end.
Q. I don't want any guessing.
A. Well, I have known them to stop at the tower when they were
orking at this end. Most of the time they went to Pavonia.
Q. What time in the morning did they go by there?
A. O, about 6 or 7 in the morning.
Q. Sun or standard?
A. Sun time. I knew they go in the morning, I see them go
back and forward up the track.
Q. Can you tell any morning that you remember their only going
to the old tower and not going to Pavonia?
A. I can't just give the dates but I have saw them go there.
Q. The car that they used to go back and forth on they kept at
Pavonia?
A. Yes, sir.
Q. Do you know what kind of a car that was?
A. I know they had one that they pumped a while and then later
they got a motor car. I don't know just what time they got that.
Q. Do you know how many men it would take to lift that on
and off the track?
A. No, I don't, I never watched them.
Q. Did you see a freight train that morning going west?
A. No, I didn't see the freight.
Q. You didn't see the engine pushing it up the hill?
A. No, sir.
Q. You have seen that done?

A. Yes, sir, lots of times.
Q. Where would the engine come from to push it up?
A. Well, it would follow behind generally.
Q. It would uncouple from another train to push it up the hill?
A. Yes, sir.
Q. Then it would back up again and pull its train up?
A. I suppose so, that's the only way they could do it.
Q. You have seen that done pretty frequently?
161 A. Yes.
Q. It is a very steep grade there?
A. Yes, sir.
Q. Now, did you see the train standing there that the engine was uncoupled from?
A. No, sir.
Q. You don't remember seeing it?
A. I didn't see it.
Q. Where were you when you saw the passenger train coming down?
A. I was just coming out of the house going to the barn?
Q. How close is your house to the railroad track?
A. It is just about 125 rods.
Q. East or west?
A. My house is in this direction (indicating). Here would be the house and the tower set right over here in this direction.
Q. Give the point of the compass?
A. Well, it would be southeast.
Q. Now, what time in the morning were you going out when you saw this train?
A. Well, I can't tell exactly the time. I had started up the fire and went to the barn to do the chores. I don't know the time exactly.
Q. Give us an idea?
A. Probably between 6 and 7, pretty close to 7, I should judge.
Q. Sun or standard?
A. Sun time.
Q. You are not certain whether it was closer to 7 or 6?
A. It was along about 7, half past 6 or 7.
Q. Do you know how many coaches were on this passenger train?
A. No, I don't remember.
Q. Was it a passenger train or what is called the Wells-Fargo Express train?
A. Well, it was a train that had coaches on like a passenger train. It looked like a passenger train. I think it was 14, I am not certain. I think it was the morning train No. 14.
Q. Now, the engine was backing back some where along that train, was it near the engine?
A. No, it was back a piece.
Q. About how far?
A. Well, I should judge a couple or 3 coaches.
Q. About how many coaches from the rear?
A. I didn't notice that.

Q. Did you notice the engine stop?
A. Yes, it stopped when it got back this side of the tower a piece.
Q. But you didn't see this train standing down below?
A. No, I didn't see it at all.
Q. Was there anything to obstruct your vision to see whether it stopped down there?
A. No, sir.
Q. I understood you to say you didn't see the train at any time?
A. No, I didn't see the train at all.
Q. I understood you to say they frequently helped trains up over the hill?
A. Yes, sir.
Q. And the engine would come back and couple up with the train that it left?
A. Yes, sir.

Redirect Examination:

Q. How far is the top of the hill, what they call the Summit, from the point where you understood this young man was run over?
A. To the extreme point?
Q. Yes.
A. Well, I should say a mile and a half, anyway.
Q. When you would see them push a train up there, how far up would the engine go pushing?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. Well, I have saw them go to the top of the hill sometimes, and sometimes not so far.
Q. Now, did you notice the speed of the passenger train that morning coming down there with the engine coming along side of it?

Objection; overruled; exception by defendant.

A. O, I didn't notice it particularly, no.
Q. Could you tell the jury approximately how fast it was running?
A. O, it wasn't running so very fast, just about the way they ordinarily run down there.
Q. About how many miles an hour would you say?
A. I don't believe I could judge that hardly.
Q. Going down grade, both of them?
A. Yes, sir.

JOHN JENNINGS was introduced as a witness on behalf of
163 the plaintiff and, being first duly sworn, was examined by Mr. Kerr and testified as follows:

Q. Your name is John Jennings?
A. Yes, sir.
Q. Where do you reside?
A. Weller Township.
Q. Where do you live with regard to the place where P. W. Hecht lives?
A. A little northwest.
Q. On which side of the railroad do you live?
A. The north side.
Q. On the opposite side from the Hecht place?
A. Yes, sir.
Q. How far is your house from the railroad?
A. Probably a couple of hundred feet—2 or 300.
Q. Were you at any time employed as a section man on the section of the Erie right there?
A. Yes, sir.
Q. How long?
A. A little better than 7 years.
Q. Are you so employed now?
A. No, sir.
Q. Did any of your friends or boys work on the section with you?
A. Yes, sir.
Q. How many of them?
A. In all, there has been three of my boys.
Q. How long back was that?
A. One worked till March 10th, this year.
Q. During the years you and your boys worked on the section, how did you go to your work?
A. Went up the track.
Q. And how did you get to the track from your house?
A. Walked out to the track.
Q. From the house?
A. Yes, sir.
Q. What was your way of getting out, was there a path or anything?
A. Yes, sir, a path from my place out to the track.
Q. Did that path go any place else except out to the railroad?
A. No, sir.
Q. How was it made?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. I suppose by us going back and forth to the track.
163½ Q. To a train going past, what side of the track do you live on?
A. Right hand side going west.
Q. Which side does an engineer ordinarily occupy?
A. Right hand side.

Q. Now, I will ask you to state, on the morning in question, whether you saw the passenger train going east and the engine coming along?
A. Yes.
Q. Where were you at that time?
A. I was north of the track, probably 50 ft. from the track.
Q. About what time was it?
A. Well, I don't know exactly, it might have been probably a little after 6 o'clock.
Q. From your position, how far was it from this road crossing that comes down from the Hecht buildings?
A. Pretty well on to a quarter of a mile.
Q. Where were this train and this engine when you saw them?
A. In front of my house.
Q. Was it attached to a train when you first saw it?
A. Yes.
Q. Now, when the passenger train came down, just describe, as it went down east, how the engine and passenger train ran.
A. How fast, do you mean?
Q. Well, yes, how fast did they run?
A. Well, probably the passenger train was going 40 or 45 miles an hour.
Q. Where was the engine?
A. The engine was running along side of the passenger train.
Q. What was its speed?
A. O, probably 15 or 20 miles after it got started.
Q. How far down the track could you see?
A. O, probably 200 or 300 ft.
Q. Could you see down to the Hecht road crossing?
A. Well, probably I could.
Q. Do you know where it was said this young man was run over, did you go to see the place afterward?
A. No, sir.
Q. Do you know where the place is where it was claimed to be?
A. Yes, sir.
Q. How far is that east of where you were standing about?
A. I think it is close to a half a mile.
Q. Is that the place you understood he was hurt, a little cut east of the road crossing there?
A. Yes, sir.
Q. That morning did you go down and learn that he was hurt or did you know it for a while?
A. I didn't at the time.
Q. When did you first learn that he was hurt?
A. I learned that somebody was hurt from the rear brakeman or flagman,—I don't know which it was,—on the caboose of the train that was standing there.
Q. Now, who was on the engine that went down, could you see?
A. No, I couldn't see, I don't know that.
Q. Do you know whether there was an engineer on it or not?
A. Yes, there was an engineer.

Q. And a fireman?
A. Yes.
Q. Did you see anybody else?
A. I didn't notice anybody else.
Q. Was there anything attached to it except the engine?
A. Just the engine.
Q. What way was it moving?
A. Going east.
Q. Was it going forward or backward?
A. It was backing up.

Cross-examination by Mr. Sidell:

Q. Were you working that day?
A. Yes, sir.
Q. You hadn't started to work at that time?
A. I had just started from the house and got out about 50 ft. from the track.
Q. When the freight train went west?
A. It was going west, yes.
Q. The freight train went west?
A. Yes, sir.
Q. And was pushed by the engine?
A. Yes, sir.
Q. That was the first train you saw?
A. Yes.
Q. Was it right in front of your property?
A. Pretty near in front of my property, yes.
Q. How far did that shifting engine continue to go west?
A. In front of my house.
165 Q. Just in front of your house?
A. Yes.
Q. Did the passenger train come along before you got to the railroad track?
A. No, sir.
Q. Now, when it got opposite your house, the freight engine was disconnected from the train that was coming up the hill?
A. Which train have you reference to?
Q. You saw the engine helping the freight train up the hill?
A. Yes, sir.
Q. Where did that helping engine disconnect from the train it was pushing or helping up the hill?
A. Pretty near in front of my house.
Q. Where were you?
A. I was standing north of the track about 50 ft.
Q. As soon as that engine disconnected it started back and coupled up to its train, as I understand it?
A. Yes, sir, backing up and going east.
Q. You understood it had cut off from its own train to help this other train up the hill?
A. Yes, sir.

Q. And there was no other way of getting back except by going backward?
A. I don't believe there was.
Q. You had seen that day after day while you worked there?
A. Yes, sir.
Q. There was seldom a day that did not occur when you worked there on that section?
A. O, yes, there was a good many days that that did not occur.
Q. Well, it was a very frequent occurrence, anyway?
A. No, not frequent either.
Q. You have had enough experience on railroads to know that, in extreme cold weather, it is more difficult to keep up steam?
A. Yes, I know that.
Q. And on an extremely cold day they would be more likely to have an engine help them up the hill than on a day that was moderate?
A. Probably they would.
Q. Now, at that time you hadn't seen the passenger train,
166 or what you call the passenger train?
A. At what time?
Q. At the time the engine that was helping the freight train up the hill had disconnected and started back?
A. No, I hadn't noticed it yet.
Q. It hadn't come into sight?
A. No, sir.
Q. The freight engine started back and, in a short distance, it got out of your view,—the helper engine, as we will call it?
A. Well, it was quite a distance, 200 or 300 ft. I could see the engine going.
Q. At any rate, when that engine started back to connect with its train, 200 or 300 ft., it was then out of your sight?
A. Probably, yes.
Q. From that time on you couldn't see it?
A. Probably I couldn't see it.
Q. I don't want the probability, give us, as best you can, your recollection. Soon after it got out of sight, going east on the west bound track, the passenger train, as you call it, came along, which, as you understand, was No. 14, is that right?
A. Yes, after the engine got loose the train came down there pretty soon, before the other engine got out of sight.
Q. It couldn't have been very much in sight if it had only to go 300 ft. to get out of sight? That was No. 14, was it?
A. Yes, sir.
Q. No. 14, as you understand it, is an express train and not a passenger train?
A. I understand that.
Q. It is what is called the Wells-Fargo Express, that is right, is it?
A. Yes, sir.
Q. And that is the train that was there that morning?
A. Yes, sir.

Q. And it was going, I take it, at its usual speed, as far as you observed?

A. As far as I know.

Q. And that is all you know about it?

A. Yes.

Q. Now, being a section man for some time, tell us how far apart, from center to center, are the parallel tracks of that road?

A. I can hardly tell you.

167 Q. Did you ever measure the distance between the two nearest rails of parallel tracks?

A. I have but I don't remember.

Q. Suppose I refresh your recollection,—would you say 13 ft. from center to center?

A. Maybe it is, yes, sir.

Q. Do you now recollect that that is the distance?

A. I don't recollect.

Q. From what used to be the old tower you can see west for a mile, can't you, or a half a mile up the track, from the point where the old tower was?

A. Yes, sir, probably you can see pretty near half a mile.

Q. Don't you think you could see ¾ of a mile?

A. Well, I don't know whether you can or not.

Q. It is your opinion that you could see at least half a mile?

A. Probably, yes.

Q. The land on either side of the railroad is practically on the same elevation or level as the tracks of the railroad?

A. No, it ain't.

Q. Is the railroad above the land?

A. No, there are some small cuts there.

Q. Do you mean right at what was the old tower?

A. It set right in a small cut there.

Q. Right west of that you get out of the cut, don't you?

A. Yes, sir.

Q. How far from the point where old Summit tower was is it till you get out of what was called the middle cut, to the west?

A. I don't know exactly, it is not so very far.

Q. Well, will you say 10 rods?

A. Yes, sir.

Q. 20 rods?

A. Maybe it is 20 rods.

Q. Well, at any rate, in the neighborhood of 20 rods from where the old Summit tower used to be west the railroad track is at least as high as the land on either side?

A. No.

Q. You get out of the cut and that means as high as the land is on either side?

168. A. It is a little cut for quite aways yet.

Q. Well, you said 20 rods. Now, I am going beyond the 20 rods from the old Summit tower west for 20 rods you say there is still a cut?

A. From the old Summit tower?

Q. From the old Summit tower.
A. Well, I misunderstood your question.
Q Well, I will have you understand it now. I don't mean the present Summit tower, I mean the old Summit tower, you know where that is?
A. I understand that.
Q. That is a mile and a half from Pavonia, isn't it?
A. Yes, sir.
Q. It is practically at mile post 262½, if I remember correctly, west of Pavonia, is that right? Pavonia is at 261, is that your recollection?
A. Yes, sir.
Q. Now, it is at that point, at old Summit, just a mile and a half from Pavonia, from that point continuing west is the railroad in a slight cut?
A. No, sir, not for about 20 or 25 rods, no cut at all.
Q. Well, from the old Summit you fix it now at 25 rods?
A. I said 20 or 25, I didn't measure it.
Q. You are simply giving your best estimate of it?
A. Yes.
Q. The railroad track is as high or higher than the land on either side?
A. From the tower west, do you mean?
Q. Yes.
A. Yes, the track is a little bit higher than the ground on the sides.
Q. In other words, it is practically on the same level so that you wouldn't call it a cut or a fill, is that what you mean?
A. Yes, sir.
Q. Then when you go further west from the old Summit tower this 20 or 25 rods, according to your estimate, how do the railroad track and the land on either side correspond in elevation?
A. There is a cut.
Q. How far does that cut extend west?
169 A. It extends pretty well up to my property.

Noon.

Q. On the right hand side going west the tendency of the surface of the ground is lower, isn't it, toward the right, and it tends to elevation towards the left, as you go west? I am talking about from where the cut commences 20 or 25 rods west of old Summit.
A. Yes, on the south it elevates a little.
Q. That is a very slight cut, isn't it?
A. O, it is not a big cut, no, sir.
Q. You speak of the tracks as running east and west when they are nearer north and south, do you not?
A. Yes, some places they don't run directly east and west.
Q. Now, as you go west from the commencement of this cut, the embankment on the right hand side as you go west is lower than it is on the left hand side?

A. Slightly.
Q. Do you know where the farm crossing of Mr. Hecht is?
A. Yes, sir.
Q. How far is that from your place, I mean from where you go out from your place on to the railroad?
A. Not quite ¼ of a mile.
Q. Give it in rods as nearly as you can,—15 or 20 rods?
A. O, 20 rods, as near as I can tell.
Q. Now, as you go west, say where the cut commences, at the east end of it, 20 or 25 rods west of Old Summit, there the curve is quite slight, isn't it, till you get up considerably past your property?
A. Well, it's a pretty good curve there.
Q. Do you know the degree of curvature?
A. I can't use as big words as some people do.
Q. You know what the curvature of a track is, don't you?
A. Yes, sir.
Q. Is it a slight curve?
A. What do you call a slight curve.
Q. Well, a one or two degree curve, if you don't know what that is, of course, I can't expect you to answer it. You don't regard it as a severe curve such as you find up at the Summit, at the highest point?
A. No, sir, it ain't quite that much of a curve.
170 Q. You can see all over that country practically, from your place clear down to Robinsons?
A. No, I can't see Robinsons.
Q. Well, when you get on the track can you see Robinsons?
A. There is a piece of timber there.
Q. If it were not for that timber you could see to Robinsons?
A. Yes.
Q. You can see Mr. Hecht's place?
A. Yes, sir.
Q. Anywhere on the railroad there, as you walk along, you can see houses and barns, where there is no timber to obstruct your view?
A. Some places you can and some places you can't.
Q. Now, which way as you go west from the commencement of the cut, at the east end of the cut and going west, which way do the tracks curve, to the left or right hand?
A. Sometimes they go——
Q. I am only asking you about one curve.
A. Curves to the right going west.
Q. First to the right and then there is a reverse?
A. At the beginning of the cut it is on a curve.
Q. It curves a little to the right?
A. Yes.
Q. And then it turns in the opposite direction, toward the left?
A. As it leaves the cut it bears to the right quite aways.
Q. And then does it turn to the left?
A. Then there is a piece of straight track above my place.
Q. So there is no reverse curve between that point and your place?

A. No, I don't think there is a reverse curve between me and that cut.

Q. How far do you say it is from your place out to the railroad track and from there how far is it to the east commencement of the cut?

A. I don't know, I never measured.

Q. O, I know, but you know better than the jury and I do, we have never been there.

A. May be one man would judge one way and one another.

Q. I am only asking your best judgment as to the distance.

A. It might be 75 rods and it might be 100 rods.

171 Q. You fix it anywhere from 75 to 100 rods, is that your best judgment?

A. Yes, to the east end of the cut.

Q. From your property to the east end of the cut you would estimate the distance at 75 or 100 rods?

Mr. Kerr: He didn't say that.

Q. I asked you from the commencement of the cut, that is, the east end of the cut?

A. Yes.

Q. How far is that point from the point on the railroad right opposite your house?

A. 75 to 100 rods.

Q. From that point at the east end of the cut, looking west, can you see the tracks for a distance of ½ a mile?

A. Well, pretty near.

Q. As near as you can estimate?

A. Yes.

Q. When you started that morning, you started to go to Pavonia, did you not?

A. I don't recollect whether I was going to Pavonia or not.

Q. Do you remember making a statement to Mr. Quick?

A. We were supposed to go to the car house, I suppose.

Q. The car house is near Pavonia, is it?

A. Yes, sir.

Q. And you are supposed to go to that point, and you started for that point, as far as you know?

A. Yes, sir.

Q. And you started in time, as you understood, to get there?

A. Yes, sir.

Q. At the proper time, 7 o'clock, when you would go to work, is that right?

A. Yes, sir.

Q. Do you know the width of the right of way all along there, do you know it to be 100 ft. in width?

A. I don't know, that is out of my line of business.

Q. O, well, you know where the fence was on either side?

A. Yes, but I never measured the distance.

Q. You can estimate, can you not, the distance from one side to another? Do you think it is 100 ft?

A. Probably it is.

Q. Don't you think it is, is that not your judgment?

172 A. If it ain't, it ought to be. It was supposed to be 100 ft.

Q. Is that your judgment that that is the width all along there, 100 ft., all along the right of way?

A. How do I know, I never measured it.

Q. Do you have to measure it to give at least an idea of the distance?

A. I think I do, yes.

Q. What is your idea of the width all along there?

A. 100 ft. it ought to be.

Q. I am not asking what it ought to be, I am asking only your opinion of it. Now, you got on to the track, did you not, before No. 14 passed you?

A. Just about the time I got on to the west bound track.

Q. Now, please answer what I asked you, isn't it a fact that you got on to the track before No. 14 reached the point where you were going on to the track?

A. Well, about the time I was going on to the track 14 was going down.

Q. And when you were 50 ft. from the track the engine started going down?

A. About that time, yes.

Q. Now, did you say there is a path from your house or barn, whichever is nearest to the railroad there, there is a path, you say, out to the railroad?

A. Yes, sir.

Q. That is simply your home path, isn't it? The Railroad Company didn't make any path there?

A. Not as anybody knows of.

Q. That is a mere matter of your own, on your own land, and you can make paths wherever you make paths, that's all there is about it?

A. We made that path when we would go to work.

Q. Well, it was for your own convenience?

A. Yes, sir.

Q. You didn't make that path there for the Railroad Company, did you?

A. No, sir.

A. No, that's what I am speaking of.

— Do you remember that you did go that morning to Pavonia, went right down there?

A. I don't remember whether I went down to Pavonia or not.

Q. Was your son with you?

A. No, sir.

Q. Did he work there too?

A. Yes, sir.

Q. He started after you did?

A. Yes, sir.

173 Q. Did your son live with you?

A. Yes, sir.

Q. He hadn't left the house when you reached the railroad?
A. No, I say, he hadn't.
Q. Now, there is enough room, is there not, to walk between the tracks?
A. Yes, sir, there is.
Q. Don't you know the distance between the rails?
A. You asked that, yes, sir.
Q. You know that a train can pass you while you are between the tracks in perfect safety to you, don't you?
A. I don't know whether it could or not.
Q. Well, if a car only extends over the rail about 18 inches, or any part of a train—you know that it extends only about that far?
A. About that far, I guess.
Q. If cars passed each other on the two parallel tracks, they wouldn't extend into the space on both sides to exceed 3 ft., would they?

Objection.

Q. Don't you know there is 5 ft. of space between trains as they pass each other?
A. There probably is.

Redirect examination:

Q. Did you every try to stand between two tracks when a train was going on each track, to see whether it would be safe to do it or not?
A. No, sir, I never tried it.
Q. As a railroad man, what do you say as to its being safe to walk between tracks with trains running each way?

Objection; sustained; exception by plaintiff.

Q. With reference to the question put to you by counsel as to whether a car only extends out 18 inches over the rail, do you know whether that is a fact, did you ever measure one?
A. No, I never measured it.
Q. Don't it extend out over 2 ft. on an ordinary passenger car?

Objection; sustained.

Q. Do you know how far a passenger train such as were in use at that time, extended out over the rail?
174 A. O, I don't know exactly how far, I know it is a little better than 18 inches though.
Q. Do you know how wide an ordinary passenger car is inside?
A. No, I don't.
Q. Now, this path, does it extend only over your land or over on to the railroad right of way?
A. It extended right to the track.
Q. Right over the railroad right of way?
A. Yes, sir.

Q. Now, do you remember working at the old Summit down there the day before?

A. I don't remember.

Q. Do you remember whether you left the tools down there so that the other men could get them?

Objection.

Q. Do you remember anything about that? If you don't, I won't ask you anything more about it.

A. Well, I don't remember.

Q. This timber that you speak of between you and Robinson's, how far does it extend?

A. It extends quite a piece.

Q. Does it extend up above your house?

A. No.

Q. Is it any nearer the track anywhere than it is to your house?

A. No.

Q. Did you observe that morning, when the passenger train passed you, anything about the smoke?

A. Yes.

Q. Tell the jury what you observed about that.

A. That morning when I walked out to the track, when I was about 50 ft. from the track the engine cut loose and started back, then I stepped out on to the track and No. 14 came down and the smoke rolled down over the west bound track.

Q. What engine did this smoke come from?

A. Why, from 14, I think.

Q. Do you remember seeing any part of the clothing of Byron here on the track after the accident?

A. Yes, sir, well, not exactly clothing.

Q. Did you see anything?

A. I see his cap and I see one of his mittens, his dinner bucket and his handkerchief.

175 Q. Any other thing that belonged to him that you know of?

A. That's all I recollect.

Q. Did you see any blood on the track?

A. Yes.

Q. Do you know how far it was from where you found the cap and mittens to where you saw the blood?

A. About 35 ft.

Q. Where did you find the cap and mittens?

A. Lying on the track there.

Q. Do you know which hand the mitten was for?

A. Indeed I don't remember.

Q. How much blood was on the track?

To which question defendant objected.

Mr. Kerr: We want to see if there was any blood around there. You will be denying pretty soon that there was any blood there.

Counsel for defendant objected to Mr. Kerr's statement and the court instructed the jury not to consider it.

Q. How much blood was there around there?
A. There was quite a little bunch.

Recross-examination:

Q. At what time did you see that?
A. This blood?
Q. See anything.
A. Well, it was sometime afterward.
Q. Some days afterward?
A. No, it was the same day.
Q. What time then?
A. I don't know exactly what time it was.
Q. You didn't know anything about it till the afternoon?
A. That's right.
Q. You said the rear brakeman told you something?
A. Yes, sir.
Q. But you don't know who it was?
A. The rear brakeman or flagman, I don't know which it was. It was one of the trainmen.

176 Dr. R. R. BLACK was introduced as a witness on behalf of the plaintiff and, being first duly sworn, was examined by Mr. Kerr and testified as follows:

Q. Your name is Dr. Robert R. Black?
A. Yes, sir.
Q. And you live in the city?
A. Yes, sir.
Q. What is your profession?
A. Physician and surgeon.
Q. How long have you been practicing?
A. Since '97.
Q. Where were you educated for your profession?
A. Starling Medical College, Columbus.
Q. Where have you practiced?
A. I practiced 8 years in Galion, Ohio, and the balance of the time in Mansfield.
Q. I will ask you to state briefly whether you became acquainted with this boy, Byron Marietta, prior to within a week or two.
A. Yes.
Q. Where did you see him?
A. I prescribed for him a couple of times 3 or 4 years ago.
Q. Did you see him at any time when he was in the hospital?
A. Yes, sir.
Q. Were you called to treat him there?
A. I was called in consultation with Dr. McCullough.
Q. Do you know how long that was after he received his injury?
A. I think it was 9 or 10 days.
Q. Where was he when you saw him?
A. In bed.

Q. I will ask you whether, within a few days, you have made an examination of this boy, a physical examination.
A. Yes, sir.
Q. At whose request did you do it?
A. At your request.
Q. Who joined with you, if anybody, in making that examination?
A. Dr. Craig and Dr. Charles Brown.
Q. Where was the examination made?
A. At Dr. Craig's office.
Q. Had you ever made a physical examination of him prior to this time?
A. No, sir.
Q. Now, I wish you would state to the jury just the kind of an examination you made, how you did it.
177 A. We stripped him and gave him a thorough examination.
Q. What position, if any, did you have him assume when you made this examination?
A. Lying down and standing.
Q. During the progress of this examination, did you measure his height?
A. No, we didn't.
Q. Did you ever measure his height in any way, standing up or lying down?
A. No, we didn't take his entire length.
Q. What parts of his anatomy did you get the length of, if any?
A. His legs.
Q. Did you make an examination of his right leg?
A. Yes.
Q. Have you a memorandum made during that examination?
A. Yes.
Q. You may refer to that if you want to, or if you don't want to you don't need to. I want you to give, in your own way, what you found as to his condition: if you can state that without my asking questions in detail, I will ask you to do that.
A. We found that, in the right leg, both bones were fractured. I mean by the right leg, that part of the leg from the knee down. Both bones were fractured about the middle, with considerable deformity and bow, and we found evidence of a fracture of the neck of the hip or thigh bone.
Q. What did you notice as to whether the contour of the hip was normal or not?
A. I couldn't see anything abnormal in the hip.
Q. Now, you say there was some bow or something in that leg below the knee—have you got the measurement so that you can give it?
A. The right leg from the knee to the ankle was about ¾ of an inch shorter than the left leg.
Q. From your measurement and examination, which one was of the normal length, if you know?

A. The left one.
Q. What occasioned the difference in this leg?
A. The fracture and malformation or deformity.
Q. Is any of that occasioned by the fracture of the hip?
A. It might be. You can't determine that, but it might be.
Q. Did you notice whether there was any sort of cavity about that hip that was not on the other?
A. Not on the right side.
178 Q. Now, tell the jury what you found about the left leg.
A. We found the left thigh bone broken at about the junction of the lower and middle thirds, with a good deal of deformity.
Q. What kind of a fracture was that?
A. There is no scar, I don't believe there was a compound fracture. It might have been but I don't think the bone penetrated the skin, but there is a piece of bone very close to the surface of the skin now. And the small bone that goes from the ankle up to the outside of the knee is dislocated yet and the continuity of the ligaments of the knee is destroyed. That is, the ligaments are not in their natural position and that allows the knee, if he stands on it, to go back just as easy as forward and, to a certain extent, he can't stand on it.
Q. What do you say as to whether he could bear his weight on that limb?
A. I shouldn't think so.
Q. What do you say, from the formation you found there, whether he could or not?
A. I should think not.
Q. Now, you say there is a piece of bone on the left leg sticking up near the skin, will you describe that more fully?
A. Well, it sticks up probably that far (about ½ an inch).
Q. How is it connected?
A. Well, there is a union there, what we call a fibrous union, instead of being bony it is fibrous.
Q. There is only one bone of the thigh?
A. Yes.
Q. Tell the jury whether you found that condition at more than one place.
A. I think it is just the one place.
Q. What did you find, if anything, with reference to the spinal column?
A. On lying down, he has a curvature of the spine to the right but on standing it seems to be in pretty good shape.
Q. How do you account for that when he lies down?
A. Can't account for it.
Q. From your examination and your medical and surgical
179 knowledge, what do you say as to whether this condition of the spine is from an injury or natural condition?
A. It might be produced from his present condition, from walking on crutches and having one leg shorter than the other. That might produce it.

Q. Did you find out the history of the boy?
A. No.
Q. Didn't you learn that he had been run over?
A. No.
Q. Did you think he got hurt by falling off a hay wagon?

Objection by defendant.

Q. What effect does this have on his ability to move about and work or do anything, this condition of his spinal column?
A. Well I couldn't say, I couldn't answer that.
Q. Now, go on and state what else you found,—did you examine his arm?
A. His left arm is broken about the middle here (upper arm), with quite a good bit of deformity.
Q. How many bones are there in that part of the arm?
A. One.
Q. Could you tell what kind of a fracture it was?
A. Just a simple fracture.
Q. That means the bone was just broken off, it wasn't splintered?
A. A compound fracture is one that protrudes through the skin. I don't think this was that. His right collar bone was broken, his nose was broken and he has a scar on his head from the median line back 2½ or 3 inches long.
Q. In what condition did you find this fracture of the collar bone?
A. It is in pretty good shape.
Q. What do you mean by good shape?
A. Serviceable.
Q. Better than before, probably?
A. No.
Q. Well, how was it?
A. It wasn't as good as it was before.
Q. Did you notice his hands?
A. The index finger of the right hand, the end of it was cut off and the middle finger had been smashed, and the end of the ring finger is off at the first joint.
Q. Suppose that, prior to this injury, this young man was
180 5 ft. 8¾ inches in height and now he is about 5 ft. 6 in., from your knowledge of the case, what connection, if any, would that have with his injury?
A. It is due to the fracture.
Q. Now, suppose that before he was injured in 1912 he weighed 180 lbs. and since that time he has never, probably, got above 135 lbs., what connection, if any, would that have with the injury?
A. Well, the shock of the injury produced to the sympathetic nervous system disturbs his nutrition.
Q. And that accounts for his falling off in weight?
A. Yes, sir.
Q. What does that indicate as to the continuing influence of the shock?

A. If he is 35 lbs. lighter now than he was 2 years ago, it would indicate that he was not in very good health.

A. What I want to get at is what connection you make between that and this nervous shock?

A. It was produced from the nervous shock.

Q. Now, what do you say, from your examination of him and what you know of his injuries, whether he can walk without crutches?

A. I don't think he can ever walk without support.

Q. What is your opinion as to whether he will ever be any better or worse or remain the same, about as he is now, the rest of his life?

A. I don't believe he will ever be any better and, as he grows older, I imagine he will grow worse.

Q. What do you say, from your examination of the boy, taking into consideration the conditions as you have described them here, as to whether he is now or ever will be able to do manual labor?

A. He never will.

Counsel for plaintiff, at this point, requested that the plaintiff be permitted to strip and be examined by the doctor in the presence of the jury.

Court: He may go into the cousultation room and undress and the jury, court and counsel may look at him but nothing must be said as it cannot go into the record.

To which ruling defendant then excepted.

181 Dr. J. H. CRAIG was introduced as a witness on behalf of the plaintiff and, being first duly sworn, was examined by Mr. Kerr and testified as follows:

Q. You are a physician and surgeon?

A. I am.

Q. How long have you been in the practice?

A. Almost 30 years.

Q. All in the city of Mansfield?

A. Yes, sir.

Q. Prior to a few days ago, when you were called upon to make an examination of Byron Marrietta, did you have any acquaintance with the boy?

A. I never saw him that I know of.

Q. Did you make an examination then?

A. I did.

Q. In connection with whom did you examine him?

A. Dr. Charles Brown and Dr. Black.

Q. Was that at your office?

A. At my office, yes.

Q. About how long ago was that, if you can fix the date?

A. It was the 15th of April, I think.

Q. How long were you engaged in examining him?

A. A long time, I don't know the exact length.

Q. I wish you would state to the jury now, generally the man-

ner of the examination, how did you expose him or place him for examination?

A. We took all of his clothing off and placed him on the operating table and examined him there, and stood him on his feet and examined him.

Q. I will ask you whether you made such an examination as would ordinarily develop his condition.

A. Yes, I think we did.

Q. Now, I will ask you to state whether you would prefer to go on and state what you found, or whether you prefer to take it up in detail.

A. Well, beginning with the head, we found a cicatrix about 3" or such a matter, extending from the median line toward the left side of the head; we found a roughness about the nose that indicated a possible dislocation or fracture of the nose; we found
182 a fracture of the left arm about midway between the elbow and the shoulder; we found a fracture of the left femur about midway.

Q. What do you call the femur?

A. The bone of the leg. We found such a condition of the left knee than when he would put his weight upon his leg, there would be a possible luxation, a partial dislocation backward; we found in the left leg where there had been a dislocation of the fibia. The right hand, I think it was, has the first joint of the ring finger missing and the point of the index finger missing and evidence of a smashed neck; the right leg had a fracture of both bones about midway between the knee and the ankle; and there was a fracture of the right collar bone near the shoulder.

Q. Calling attention to the knee of the left leg, this dislocation of the knee that you referred to, what did you discover with regard to the ligaments at that point?

A. Well, there was a destruction of some of the ligaments of the knee or else there would be no luxation.

Q. Is that occasioned by the loss of some of the ligaments?

A. Yes.

Q. What do you say as to whether he can bear his weight on that leg?

A. He cannot.

Q. What do you say as to whether that particular condition will get better or worse or remain stationary?

A. It will get no better.

Q. What did you observe, if anything, as to his spinal column?

Objection: There is nothing in the petition about that.

Q. Now, suppose, Doctor, that this young man was injured on January 5th, 1912; that at that time he weighed 180 lbs. and from that time on up to the present time he has never had a greater weight than 144 or 145 lbs., what do you say as to any connection medically between that condition and the condition you found him in?

183 A. Well, there may be a connection between that condition and the injury, although I wouldn't want to qualify that that was the exact cause of it. I can easily see how the nervous influences would govern the repair of the body.

Q. Well, suppose, Doctor, prior to the time of his injury, say on January 5th, 1912, he was 5 ft. 8¾ in. high and after that he was probably 2 in. shorter, what would you attribute that to?

A. Broken legs.

Q. That is, they shortened up that much?

A. Yes.

Q. What do you say, from your examination of this young man, as to whether he will be able to walk without some appliance for support?

A. He will never be able to walk without support.

Q. What do you say as to whether he will ever be able to do manual labor?

A. He never will.

Counsel for plaintiff offered in evidence from the book of rules heretofore identified and marked "Plaintiff's Ex. A" and which is hereunto attached, the following rules:

Rule 107, on page 29: to which defendant objected, the court overruled the objection; the defendant then excepted, and said rule was read to the jury by Mr. Kerr.

Rule 108, on page 29; Same ruling.

Rule —, on page 8; Same ruling. (Definition of Double Track.)

Rule 586, page 117: Ruling deferred.

Rule 612, page 122: Ruling deferred.

Rule 618, page 124; Ruling deferred.

Rule 634, page 126: Objection; overruled; exception and rule read to the jury.

Rule 625, page 125: Same ruling.

See p. 93.

184 Dr. CHARLES G. BROWN was introduced as a witness on behalf of plaintiff and, being first duly sworn, was examined by Mr. Kerr and testified as follows:

Q. Your name is Dr. Charles Brown?

A. Yes, sir.

Q. You are a physician and surgeon?

A. Yes.

Q. You practice in Mansfield?

A. Yes.

Q. How long have you been practicing medicine and surgery?

A. 12 or 13 years.

Q. Here in Mansfield all the time?

A. 10 years in Mansfield.

Q. You went through the ordinary processes of education?

A. Yes.

Q. Prior to a few days ago when you made an examination of

this young man sitting at the table here, did you have any acquaintance with him?

A. No, sir.

Q. Do you know of ever seeing him before that?

A. I don't remember ever having seen him.

Q. Were you called to make an examination of him in connection with several other physicians?

A. Yes.

Q. Who were they?

A. Dr. Craig and Dr. Black.

Q. Where was the examination made?

A. At Dr. Craig's office.

Q. State to the jury how you made the examination, how you fixed him to examine him.

A. Well, we examined him standing up and lying down, sitting down, bending over and a number of different positions.

Q. Did he have his clothing removed?

A. All his clothing, yes, sir.

Q. What kind of an examination did you make to determine the condition of his injuries?

A. To determine the kind and extent of them.

Q. Did you make any memorandum as you went along?

A. I did not.

Q. Now, I will ask you to state if you can remember, if not, I will refresh your recollection as you go along, take it in any way you please as to what you found, if anything, in the way of evidence of injury.

185

A. Beginning with the right hand, there was one finger, I believe the third one, possibly the second, off at the first joint,—the end of the third finger is off at the first joint, and the tip or fleshy part of the second finger; there is evidence of an old fracture to the right collar bone, and also some deformity; there is evidence of an old fracture and also some deformity of the left humerus, that is the bone from the elbow to the shoulder; then, going down to his hip, there is without question from his history and what can be found there, without much question,—there is an injury to the hip joint, but I was unable to determine the amount of it. My opinion would be that, probably, it was a fracture of the neck of the thigh bone.

Q. That is the thing that goes into the socket?

A. Yes, between the socket head and the shaft of the bone. Then about the middle of the shaft of the left thigh bone, there was a fracture with considerable displacement and deformity. There is an overlapping of the lower fragment over the upper fragment, the lower fragment extending outward, and I think, also, there is a portion of loose bone above this fracture, above the upper end of the lower fracture. I think there is no bony union, I think there is a dense fibrous union but not a bony union.

Q. I wish you would explain to the jury what you mean by that.

A. Well, a bony union means just what it says, it is a bony attachment, a bony formation; but at other times, where there is much displacement, you may get a formation of fibrous tissue which may

e very dense but it usually allows some motion. I think there is o bony union in this case but quite a dense fibrous union. Then, n the left knee there is evidence there of a very serious injury, so nuch so that he is unable to put any weight, to any amount, on that knee, because its posterior bracing or ligamentous bracing is
186 torn off, so that he is unable to put any weight on it at all, practically. Then on the right lower leg, between the knee nd the ankle, there is evidence of the fracture of both tibia and ibula, both bones of the right leg were broken below the knee, but ¾ of the way from the knee to the ankle.

Q. What evidence was there of deformity there?

A. There is a bony union there and considerable deformity.

Q. Now, Doctor, suppose this young man was injured by being run ver by an engine on January 5", 1912; that at that time he would eigh 180 lbs. but since that time he has not weighed more than 144 lbs., what connection, if any, do you find between the condition I have indicated and the injuries you found on your examination, and that apparent loss of weight?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. Well, that is a pretty hard question to answer. His whole method of life has, of necessity, been changed and his former activity is entirely a thing of the past. His former mode of life being so changed might have something to do with it. The entire nature of the young man has had a very serious physical and nervous shock.

Q. Did you find any other thing that would account for the condition he is in and the loss of flesh, if that is true, except the injury and shock?

A. Well, he has a spinal curvature there and he also gives a history of having——

Objection; sustained.

Q. Do you attribute his falling off in flesh, if that is true, to anything but the shock of the injury?

A. I think it is very fair to attribute it to that.

Q. Now, suppose he had a height of 5 ft. 8¾ in. before the injury but since he has got up and around he has lost nearly 2 inches in stature, how would you account for that?

187 A. Well, some of the trouble might be accounted for by the spinal curvature; most of it, however, is accounted for by the fracture and some overlapping, the double fracture of both bones of the right leg and the marked overlapping of the left thigh bone.

Q. Now, take him in his present condition, Doctor, what is your opinion, from your examination and experience in cases of that sort, as to whether his condition will get better, or remain stationary, or grow worse, in the future?

A. The injuries I have described cannot improve.

Q. What do you say as to whether they will get worse or not?

A. I should think he might have, probably will have, trouble with that left thigh and left knee.

Q. What do you say as to whether he can walk without some appliance?

A. Absolutely not.

Q. What do you say, from your knowledge and experience, as to the probability that he will ever be able to do manual labor?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. He certainly will not.

Cross-examination by Judge Wolfe:

Q. What do you mean by "old fractures"?

A. I mentioned 6 or 8 old fractures, I meant fractures that were received at that time, or that were said to have been received at that time.

Q. You mean that he had some old fractures that developed prior to this railroad experience, did he?

A. No, sir.

Counsel for plaintiff then read to the jury from "Plaintiff's Exhibit A" (The book of rules,) the definition of double track, on page 8.

Counsel for plaintiff again offered in evidence Rule 586, page 117; to the introduction of which defendant objected, the court sustained the objection and plaintiff then excepted.

188 Counsel for plaintiff again offered in evidence Rule 618, page 124; to which defendant objected, the court sustained the objection and plaintiff excepted, offering to prove what the rule reads.

Counsel for defendant moved to exclude from the jury Rules 107 and 108 heretofore read; which motion the court sustained and plaintiff at the time excepted. See p. 88.

Thereupon plaintiff rested and defendant asked the court to take the case from the jury and direct a verdict for the defendant, but the court overruled the motion and defendant then excepted.

189 *Defense.*

W. P. KIMBALL was introduced as a witness on behalf of the defendant and, being first duly sworn, was examined by Mr. Sidell and testified as follows:

Q. You are an engineer of the Erie Railroad Company?

A. Yes, sir.

Q. And as such you make and assist in making surveys of track on the Erie Railroad?

A. Yes, sir.

Q. As such engineer, did you assist in making a survey of the right of way between Pavonia and Mansfield?

A. Yes, sir.

Q. Have you in your possession a map of that portion of the Erie R. R.?
A. Yes, sir.
Q. I wish you would turn to it.
A. (Turning to a blue print in a book.) Here it is.
Q. It is a blue print, is it?
A. Yes, sir.
Q. From an actual survey?
A. Yes, sir.
Q. Now, at about what mile post or half mile post was what was known as the old Summit tower?
A. Well, the one you refer to is at 262 and about .4 or .45, about 2200 ft. west of the mile post.
Q. How far east of the next mile post?
A. A little over half a mile, they are a mile apart.
Q. Now, from 15 or 20 or 25 rods west of old Summit tower, taking that as a point, to mile post 263, that would be further west, would it?
A. Yes, sir.
Q. What is the curvature of the track?

Mr. Kerr: If he is going to offer the map, that would be better evidence. There is no evidence that he knows this.

Q. Do you know that, Mr. Kimball?
A. Yes, sir.
Q. What is the curvature?
A. The first curve is a 2° curve.
Q. How far from the old Summit tower west is the curvature of 2°?
190 A. Perhaps 100 ft. The curve ends very near the tower, within a couple of hundred feet, I should say.
Q. I said from a point 15 to 25 rods west of old summit tower, taking that as a point, from that point to 263, what was the curvature?
A. There are two curves, understand, one is 2° and one is 1° 30′.
Q. Where does the 2° curve end as to old Summit tower?
A. It ends between 100 and 200 ft., I don't know exactly, there is a short piece of straight track in there.
Q. Well, I will commence the other way. At mile post 263, you have that on the map, have you?
A. Yes.
Q. What is the curvature at that point?
A. 1° 30′ or 1½°.
Q. For what distance east is the curvature the same?
A. About 1500 ft.
Q. From that point still further east what is the curvature?
A. For 2100 ft. it is straight track.
Q. So that, from mile post 263, going back east to old Summit——
A. May be I misunderstand your question, did you say east from 263?
A. Yes.

A. O, I gave that to you wrong.
Q. Well, commencing at 263 and going back east to old Summit
A. 263 is about the middle of the curve. It would be about 1400 or 1500 ft. east it is 1° 30′ curve.
Q. After you get 1400 or 1500 ft. east, how is it?
A. It is 200 ft. straight track and then comes in the other curve of 2° for 1500 ft.
Q. What is the grade between those two points?
A. 1% or 52.8 ft. per mile.
Q. It is up grade going west?
A. Yes, sir.
Q. What is the width of the right of way there?
A. I can't say exactly, it is supposed to be 100 ft. It is not less than 100 ft. In some places it is a little more than that.
Q. When was the tower established? What we designate the old Summit tower,—when was that removed?
A. It was removed in 1905.
191 Q. And taken out of there?
A. 1905, I think.
Q. Now, was there any cross-over at old Summit since the tower has been taken away from there?
A. No, sir, not since that.
Q. Is there any cross-over between that point or between Pavonia and the tower at Summit, as it is now located?
A. There is one at Summit as now located, that is the only cross-over.
Q. How far is Summit, as now located, from old Summit tower?
A. Approximately 3 miles west.
Q. You have the map there, have you?
A. Yes.
Q. This map is upon what scale, the one in your book, as you call it?
A. .1 of a ft. equals 2500 ft.
Q. In this other map, what is the scale of feet?
A. 400 ft. to the inch.
Q. Is that on the same plan?
A. It is on a larger scale but it is the same otherwise.
Q. What are the red lines?
A. They started out to build on the red lines but they changed it and moved the tower further east.
Q. So far as the curvature is concerned, is it the same on both except on a different scale?
A. The curvature is exactly the same on both.
Q. In the map on the larger scale the cross-over is not correctly shown with the red line?
A. No, sir.
Q. The cross-over should be located nearly 3 miles to the west?
A. No, you misunderstand me, the cross-over on this is the old cross-over which is taken up.

Thereupon counsel for defendant offered in evidence the map marked "Defendant's Ex. B," which is admitted and used in evidence and is hereunto attached.

192 Cross-examination by Mr. Kerr:

Q. You are a civil engineer?
A. Yes, division engineer.
Q. How far does your division extend?
A. From Kent to Dayton.
Q. Did you make these maps yourself?
A. No, sir.
Q. Where is the man that made them?
A. I don't know where he is.
Q. Who was he?
A. I don't know now who made them, they were made under my direction.
Q. You just sent somebody out and he made them. Did you ever go out and verify them by making measurements and testing the curves?
A. Yes, sir.
Q. When?
A. I can't give you any date, I have done it a good many times.
Q. Why didn't you make the map?
A. I don't make maps.
A. You don't make maps,—is it out of the line of engineering?
A. No, sir, it is not out of the line of engineering.
Q. Now, what's the man's name that made these maps?
A. Well, I can't tell you now, I don't know who he was.
Q. How do you mean you verified them, did you take instruments and go over the line and see what % of curves there were, the distances, and all that?
A. In some cases.
Q. In this case, right along by where this boy was hurt, did you do that?
A. I can't say that I did that.
Q. You only know that you detailed a man and he made a map and that is all you know about it?
A. This map has been on file for years.
Q. Just as the railroad had it?
A. Yes.
Q. Now, do you see anything particularly wrong with his map here about the curve (referring to plaintiff's map)?
A. No, there is nothing wrong with it, it is a little exaggerated.
Q. Did you ever look to see how the Richland County map is made?
A. Yes, we have it here.
Q. If this was taken off the Richland County map, just as it is on that map, it is not exaggerated?
193 A. I must say I think it is a little exaggerated.
Q. Where?
A. Where you turn at right angles there.
Q. That is the Summit. Do you see anywhere else that you think it is exaggerated?
A. It is on such a large scale I can't tell.

Q. You are not able to see anything else that is exaggerated the as to curves?

A. I don't see any curves there, they are straight corners.

Q. Now, when was the tower moved from what we call old Sum mit?

A. It was moved from the old location to the present location 1905, I think it was.

Q. And it is up at what they call Summit now?

A. Yes.

Q. It is at the summit now?

A. Practically at the summit.

Q. Before that, it was right in the middle of that grade?

A. Yes, sir, pretty well down grade.

Q. Do you know where the Hecht crossing is, where this ma Hecht lives, where there is a private crossing from one side to th other?

A. Near the tower?

Q. Yes, just a short distance.

A. Just a road crossing?

Q. Yes. How far is it from that point up to where the new sum mit is now?

A. O, it is 2½ or 3 miles.

Q. Do you think it is as much as 2½?

A. I think so, yes.

Q. Well, there was a cross-over there, wasn't there?

A. At the new tower there is one now.

Q. And there was in 1912?

A. Yes.

Q. And there was one at Pavonia in 1912. So this engine push ing up here could have gone up to the summit cross-over and com down the right track, couldn't it?

A. I don't know any reason why it couldn't.

Q. Now, how far is it between these posts 263 and 262½, are the mile posts?

A. ½ mile apart.

Q. How does one come to be designated 262½?

A. There is a post every half mile and every quarter mile.

Q. Now, there is a post near this crossing?

194 A. A half mile post.

Q. What is the number of it?

A. 262½.

Q. Are they numbered going west.

A. Yes, sir.

Q. Commencing where?

A. Salamanca.

Q. Do you remember how near this Hecht crossing is to thi 262½?

A. No, I can't give it to you very closely.

Q. 263 is just a half mile west?

A. Yes.

Q. And there are two curves in there?
A. Yes, sir.
Q. One curves one way and one another and between is a piece of straight track?
A. Yes, sir, 200 ft. of straight track.
Q. They are both between those two posts, aren't they?
A. There is a curvature extending beyond one of the posts there.
Q. Are these two maps just the same?
A. They are the same except that they are on a different scale.
Q. Are the blue prints taken from the same original? O, no, they wouldn't be. How did you make them the same?
A. They are two separate maps.
Q. Then they have different originals, of course?
A. Yes, sir.
Q. This map don't show as much in extent as this one does?
A. This is 400 ft. to the inch and this is 2500 ft. to the inch or 1/10 ft.
Q. When was this made and what was it made for?
A. This was made for the double track, Madison and Summit are the same.
Q. Do you say that this shows the same kind of curves as that map?
A. Yes, sir.
Q. It don't go to Pavonia?
A. No, it don't go to Pavonia.
Q. And it don't go down to the old tower?
A. Yes.

Redirect examination:

Q. Where is the cross-over to the east?
A. About 3 miles east of Pavonia.
Q. Now, at mile post 263, what is there by way of a road crossing?
A. There is an underground public highway.
Q. Under the railroad?
A. Yes.
195 Q. And what is there a short distance west of that shown on the map, is there an arch there?
A. Yes, sir.
Q. How far are they apart?
A. 400 or 500 ft.
Q. I wish you would tell the jury where, with reference to the mile post, half mile post or quarter mile post, that Summit tower was.
A. About 2000 ft. west of mile post 262, practically a half mile west of mile post 262.
Q. Do you know where John Jennings lives there?
A. I know where John Jennings lives.
Q. With reference to that, where is mile post 262?
A. Right opposite their house.
Q. It was some distance from there going back to old Summit?
A. Yes, a little over half a mile.

Q. That would make old Summit nearest to what mile post half mile post?

A. 262½

Q. Then between 262½ and 263 there is a quarter mile post there?

A. Yes, sir.

Q. Are the mile posts and half mile posts just the same or are the varied?

A. The mile posts are the largest, the half mile posts are small and the quarter mile posts are still smaller and have nothing them. The mile posts and half mile posts are marked.

Counsel for defendant offered in evidence the map identified the witness and it was admitted and used in evidence and is hereun attached, made a part hereof and marked "Defendant's Ex. B."

Mr. Kimball: I was mistaken about the date that tower went o I said 1905 and I should have said 1911.

196 L. S. QUICK was introduced as a witness on behalf of th defendant and, being first duly sworn, was examined by M Sidell and testified as follows:

Q. You are the claim agent, are you, of the Cincinnati Division the Erie Railroad Co.?

A. Yes, sir.

Q. And as such, in case of accidents, you investigate, do yo

A. Yes, sir.

Q. Did you interview Mr. Marietta at any time and take his stat ment in writing as to the facts?

A. Yes, sir.

Q. Where did you take that statement?

A. At the hospital.

Q. Had you talked to him before you wrote this "Ex. A"? Firs when was this "Ex. A" taken?

A. Feb. 22", 1912.

Q. Had you talked with him before reducing it to writing?

A. Do you mean the same day?

Q. Yes.

A. I talked the matter over with him before reducing the sub stance of it to writing.

Q. And did you write it down as nearly as you could from th facts as he told you?

A. Yes.

Q. And then what did you do by way of reading it to him?

A. I gave it to him to read.

Q. Did he apparently read it?

A. He evidently did.

Objection; sustained.

Court: What did you observe.

A. He took the paper and read it over.

Q. For what length of time?

A. Well, 3 or 4 minutes.

Q. Whose signature is that, who wrote the name there?
A. Mr. Marietta.
Q. I see there are two of them, did you write something in afterward, after he had signed it the first time?
A. I don't know whether I wrote that postscript after he signed the first time, or whether I wrote it when I wrote the other and asked him to sign it twice.
Q. So as to be a statement of everything above it?
A. Yes.
Q. And did you see him sign it?
A. Yes.
Q. What if anything did you as[illegible]as to the statement there being correct?

Objection.

Court: You may relate any conversation that you had with the plaintiff.
A. I can't recollect any exact question, but I asked him if that was correct and if the facts relating to it were correctly stated?
A. What if anything, did he say?
A. I don't recollect his words but they were to the effect that it was.

Counsel for plaintiff moved that the answer be stricken out.

Court: You may give the substance if you don't recollect the exact language.
A. Well, he didn't say it was wrong.

On motion of plaintiff the court instructed the jury not to consider the answer.

A. I cannot recollect, as I said before, the exact language, the exact words that were used.
Court: Can't you recollect, as you claim, the substance of what he said?
A. Well, he said that it was all right.

Cross-examination by Mr. Kerr:

Q. You are a sort of detective for this Railroad Company, aren't you?
A. No, sir.
Q. Your business is to run down boys and men that get hurt and get a statement out of them when they are sick, in order to help the Railroad Company, that is your business, isn't it?
A. I get a statement.
Q. You knew this sick and crippled boy would likely sue the Railroad Company and you sneaked up to the hospital while he was in bed and got a statement out of him?
A. I got a statement from him.
Q. That is your business to follow up that kind of thing for the Railroad Company?
A. No, sir.

Q. Do you do anything else?
A. Yes, sir.
Q. What is it?
A. I investigate fire claims.
Q. You go to the lawyers and try to pry out of them the testimony they have?
A. No.
Q. You did that with me?
A. No.
Q. Isn't it your business to go to an inexperienced and uneducated fellow of that kind, that don't know what the writing means and can't read, and you write it up and have him sign it, under some sort of an arrangement?
A. No, sir.
Q. You promised this boy that the company would do something for him if he made a statement, didn't you?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. No.
Q. You never did?
A. No.
Q. Will you swear you didn't tell him that the company would treat him right and do something for him if he would make a statement to you?
A. No, I didn't make any condition of that kind.
Q. You followed him around a good deal, didn't you?
A. No.
Q. You followed him out to the farm after he was hauled out there in the ambulance?
A. Yes.
Q. What did you want with him out there after you had a statement from him at the hospital?
A. To see if I could make a settlement with him.
Q. Well, you didn't make any settlement with him, did you?

Objection by defendant; sustained.

Q. How many times did you go out to see him after he was on the farm?
A. I remember twice.
Q. How many times were you up to the hospital?
A. I know of once but I think I was there twice.
199 Q. That is 4 times that you pursued this boy to see him and talk to him while he was still in bed, didn't you?
A. He wasn't in bed all this time.
Q. How do you know?
A. I saw him.
Q. Was he in bed when you saw him at the hospital?
A. Yes, sir.
Q. Went there to the bedside of this crippled boy and wrote up some kind of statement that you made up yourself and got this

poor crippled boy in bed to sign it? That's what you did for this Railroad Company?
A. I didn't make it up.
Q. Do you say he told you that?
A. Yes, sir.
Q. Just as it is here?
A. Yes, sir.
Q. And you put on here that he swore to it,—did you swear him?
A. No.
Q. Then this is false, isn't it?

Objection by defendant.

Q. This is absolutely false "Sworn to before me this 22nd day of February" and so on? Now, that is a fabrication pure and simple?

Objection by defendant.

Q. You didn't swear him, did you?
A. I told you I didn't.
Q. You have it on here "Sworn to" and the date, haven't you?

Judge Wolfe: That is in the blank, that isn't written there. Of course, he had his printing press right there.
Mr. Kerr: O, you can explain it all right but you better let this detective explain it.

Q. That is false, isn't it: "Sworn to on the 22nd of February."

Judge Wolfe: Let me see it, I don't believe that is on there. I object.
Court: You may ask him whether it was sworn to.
Mr. W.: It does not purport to be sworn to.
Mr. K.: It says for itself it is sworn to.
Mr. W.: Then why do you ask this witness?
Mr. K.: Because he says it is not sworn to and I ask him if that is not false, then, as it appears here.

200 Q. Now, when you got this first statement above this point here (indicating), you were not quite satisfied, you went back another time, you hadn't got the boy in the hole yet quite in the first part of this statement?

Objection; sustained.

Q. What did you go back the second time for?

Objection.

Q. You said this postscript was put on at a subsequent time. You went there twice to see him and the last time you got this postscript?
A. You have the wrong impression.
Q. You said you were there twice?
A. I think what I said about the postscript will be shown by my former answer.

Q. You went back there at a subsequent time and got that post script?

A. I don't know what you mean.

Q. Do you know what subsequent means?

A. Yes.

Q. Well, that is what I mean, did you go back a second time or day and get that postscript?

A. It was all done the same day.

Q. I don't care whether you went back the same day or a subsequent day. If it was the same day, you went back a second time, after you got the first one, and got him to sign another one?

A. I don't understand what you mean.

Q. Do you say to the jury that you don't know what I mean?

A. If you are asking about——

Q. I am not asking what you want.

A. I will answer it if you——

Q. I want you to answer my question.

Judge Wolfe: Under the rule, he is entitled to fair treatment to have that paper and look at it.

Q. I will ask you if you went back the second time, whether the same day or another day, and got him to sign this postscript.

A. I can't answer that yes or no.

201 Q. Can you answer whether you did it all at one time or at two different times,—do you say to the jury you cannot answer that yes or no?

A. I can't answer it yes or no.

Q. Tell the jury why you can't answer it yes or no.

A. The question is in such shape that it is not susceptible of an answer yes or no.

Q. I asked you whether you made that paper writing all at one time and had him sign it all at one time or whether you made the first part of it at one time and had him sign the postscript the second time.

A. I made the paper all at one time.

Q. The whole of it?

A. Yes.

Q. Then what did you add the postscript for?

A. There wasn't room in the body of the statement for the postscript.

Q. You had him sign it and had it all completed and then you put the postscript on and had him sign it again?

A. I didn't say so.

Q. Look and see if you haven't two signatures, one on the body and one on the postscript.

A. Yes.

Q. Didn't you have the man sign it twice?

A. The postscript was put at the bottom and I left room for the signature there.

Q. Do you swear you didn't have him sign the body of this or try to have him sign it, and then went away and thought of some-

ing else and added this on and had him sign it again, even if was on the same day,—you did that, didn't you?
A. No.
Q. You swear to the jury that you wrote that all at once?
A. Yes.
Q. The body of it here,—you had him sign it twice at the same me?
A. Yes, sir.
Q. All at one sitting?
A. Yes.
Q. With no space between?
A. No, sir.
Q. I see you are a witness to it, "L. S. Quick'?
A. Yes, sir.
Q. You were drawing the document and signing it as a witness? Why didn't you have some one else come in as a witness for the oy, you were for the railroad?
A. I was working for the railroad.
Q. Why didn't you get some friend of the boy about the hospital to come in and witness it, to see whether he intended ecuting a paper of that kind?
A. No need to.
Q. Not for the Railroad Company but for the boy.
A. There was no need of it.
Q. You think it was perfectly safe in your hands, representing he Railroad Company?
A. There was no deceit at all.
Q. You were perfectly fair and above board for the Railroad ompany all the time, were you?
A. Yes, sir.
Q. When did you say this paper was made, Mr. Quick?
A. The time that it is dated, Feb. 23, 1912?
Q. When was it made, what was the date of it?
A. Feb. 23, 1912.
Q. Where does it say it was on that date?
A. At the bottom.
Q. Any other date than the one that is on there "Sworn to be- ore me on the 22nd day of February",—is there any other date n it?
A. Yes, there is one at the top.
Q. That is the only date, isn't it? What is the date of the post- cript?
A. The postscript isn't dated.
Q. And you say you finished up the body of this in one day, had im sign it, and then, at the same time, you added the postscript o the body and had him sign it a second time,—you swear to that?
A. Yes, sir.
Q. There is no date to the postscript?
A. No, sir.
Q. It shows a completed document down to the postscript?
A. Yes, sir.

Q. Didn't you say in your examination in chief that you couldn't tell whether you put the postscript on there the same day or on a subsequent day?

A. I don't remember saying that.

Q. Well, if you didn't know 15 minutes ago, how do you know now, that you didn't add it at a subsequent time? How do you recollect that it was all done at one time? Is your recollection refreshed some way or another?

A. I don't recollect having said that it was not put on there the same day.

203 Q. Do you say you didn't say to the jury, when Mr. Sidell was examining you, that you couldn't tell whether this thing we are calling a postscript was put on at a subsequent day or not?

A. I don't know that I said it was put on at a subsequent day.

Q. Didn't you say you couldn't tell whether it was put on there at the same time or at a subsequent time?

A. I don't know that I did.

Mr. Kerr: I wish the stenographer would turn back and find his answer.

(Reading from the examination-in-chief of this witness) "I don't know whether I wrote that postscript after he signed it the first time, or whether I wrote it when I wrote the other and asked him to sign it twice?

Q. Now, I will ask you whether you didn't say to him that you didn't know whether you wrote it all at the same time and had him sign it twice, or whether you wrote the postscript after he signed it the first time? What do you say now? (Witness did not answer). Do you remember now whether you said that or not?

A. Well, I can't remember what answer I made.

Q. A few minutes ago?

A. No.

Q. You knew as much about it then as you do now?

A. I wrote it all at one sitting.

Q. Didn't you say to Mr. Sidell that you couldn't remember how that was?

A. I told Mr. Sidell, according to my recollection, that I didn't know whether I finished the body of the statement and then, having the postscript matter in my mind, I added that and gave it to Mr. Marrietta to read the entire matter at the same time—I can't swear as to which was done.

Q. Is that the way you want to say it now?

A. That is correct.

Q. You just now said to the jury that you couldn't tell whether he signed it at a subsequent time or whether he did it all at once?

A. I said the transaction was all at one sitting.

204 Q. When did you say that, did you say that to Mr. Sidell when he asked you about the postscript?

A. I didn't mention the word "sitting."

Q. And you didn't say anything that would mean that, did you?

A. I think I said something that would take that construction.
Q. I just want to know the fact. Was this the first time you w the boy when you went there to get this statement from him?
A. No, I think not, I think I saw him once before.
Q. How long before this 22nd of February?
A. I have no recollection of the date but it occurs to me that was shortly after the accident.
Q. Just as soon as they would let you in? You applied at one me and they didn't let you in to see him?
A. No.
Q. Never?
A. No.
Q. Didn't you ever go there when they wouldn't let you in?

Objection: He has answered that twice.

Q. Now, how long after the accident did you go there to see im?
A. I don't know how long, it wasn't very long.
Q. About how long?
A. Well, anything I would say would be a mere guess but I am rongly of the opinion that it was a few days after the accident.
Q. How many days?
A. I can't say.
Q. Was it a week afterward?
A. I don't know.
Q. Weren't you in the hospital five days after the accident, try- g to talk to this boy about the accident?
A. I don't think I attempted to talk to him at all the first time went to the hospital.
Q. You went in to see him?
A. Yes, sir.
Q. You tried to talk to him?
A. I didn't have any conversation.
Q. You went there to talk to him if he was able to talk?
A. If I had found him in shape to discuss the matter, I probably ould have discussed it.
Q. Nearly every bone in his body was broken and you 205 went there four or five days afterward to discuss it with him?

Objection sustained.

Q. What did you go there to talk to him about a few days after he accident?

Objection; overruled; exception by defendant.

A. I went there to see how he was getting along—I frequently go to see how they are getting along.
Q. You are a sort of charity man too?

Objection; sustained.

Q. Were you there in any other capacity except as claim agent of the Erie Railroad Company?
A. No.

Q. You went to see this boy a few days after his accident, when he was confined to bed, to talk the matter over with him?

A. No, I don't know as I went to talk the matter over with him. I knew he was in very bad shape and I didn't know just how he was being taken care of at the hospital, and I thought I would go to the hospital and see.

Q. I didn't ask you that. You knew this boy hadn't any education, just a common working boy, and he didn't understand the meaning of the words or language here, didn't you know that from what you knew of the boy?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. No, I didn't know that he didn't understand language.

Q. You knew by what he was working at and his age that he hadn't much experience in that sort of thing, didn't you?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. No.

Q. Did you think a boy of 19, working on a section and had driven a team before that—do you think he understood and knew the meaning of a document that you would draw up?

To which question defendant objected, the court over-
206 ruled the objection and defendant then excepted.

A. I had no reason to believe that he wouldn't understand ordinary language.

Q. You knew some of the history of the boy before that, you found out where he had worked?

A. I knew he had worked on the section.

Q. Was anybody present up in the room there when you read this thing or when he read it?

A. I am not certain.

Q. There was nobody present, was there?

A. I am not certain.

Q. There wasn't a nurse or anybody connected with the hospital present?

A. I am not certain.

Q. Don't you know there was not?

A. I don't know.

Counsel for defendant offered to introduce in evidence the statement identified by the witness; to the introduction of which plaintiff objected, the court overruled the objection, plaintiff then excepted, and the statement was admitted and read in evidence and is hereunto attached, made a part hereof and marked "Defendant's Ex. A."

207 D. F. MARTIEN was introduced as a witness on behalf of the defendant and, being first duly sworn, was examined by Mr. Sidell and testified as follows:

Q. State your name.
A. Dallas Frank Martien.
Q. You formerly lived in this city?
A. Yes, sir.
Q. Do you now?
A. No, I live in Galion.
Q. Did you live in Mansfield at one time?
A. I was born and raised here.
Q. On the 5th day of January, 1912, what position did you occupy?
A. I was in charge of a train, an extra.
Q. Of what train, a freight train?
A. Yes.
Q. What do you now remember was the number of the engine?
A. 1711.
Q. You were conductor of the crew, were you?
A. Yes, sir.
Q. That train was going in which direction?
A. Going west.
Q. Now, when you reached Pavonia or near Pavonia, on this side of Pavonia, what if anything took place out of the usual?
A. Well, we had a pretty heavy pulling train and we pulled up to Summit Tower, and there was an extra ahead of us stalled on the hill.
Q. What part of the train were you on at that time?
A. At that time I was on the rear of the train.
Q. Have you your train book of that train?
A. Yes.
Q. Have you it with you?
A. Yes.
Q. How many cars did you have with you?
A. 29 cars.
Q. Give the destination of some of them.
A. We had cars for Hammond, Ind.

Counsel for plaintiff objected to the question and moved that the answer be stricken out; but the court overruled the objection and motion and plaintiff then excepted. Counsel for defendant stated that the purpose of the question was to show that this was interstate commerce.

208 Q. Well, go on?
A. Fargo, Ill., Wilgers, Ind., Griffith, Ind., Bridgeport, Okla., and Granite City, Mich.
Q. O, that's enough. Were those cars loaded cars?
A. Some of them. One was empty for Wilgers, Ind.
Q. Any others empty?
A. One for Hammond was empty, the rest were loaded.

Q. What was done with reference to cutting the engine off fr your train?

A. The slack of the head train came back against us and we se we couldn't start with the whole train and haul ours, so the he man cut the engine off and shoved them up.

Q. Where was the head end of your train standing?

A. It was standing right east of the tower.

Q. That was the old tower?

A. Yes.

Q. How near to the old tower?

A. O, well, east a car length.

Q. Did you get off the engine or did you not when it was cut o

A. No, sir, I didn't, I was in the rear of the train.

Q. When the accident occurred, were you present?

A. No, sir.

Q. Where were you when you heard of it?

A. About the middle of the train.

Q. While your train was standing there, what did you do in t way of examining your cars to see if you can discover anythi out of the usual.

Objection: I don't see what that has to do with this case.

Overruled.

A. I set the air brakes at the rear of the train and then I g down and walked toward the front of the train. I walked along see if there was anything wrong, and I met the head man comi back and he told me——

Objection; sustained.

Q. What did you do in the way of starting toward the engine the front of the train the second time?

209 A. Well, I went ahead and when I got there they had hi in the engine, so we started to go to Mansfield to take hi to the nearest hospital.

Q. Did you take the train?

A. Yes, sir.

Q. That is according to your instructions, is it, or rules?

A. Yes, sir.

Qbjection by plaintiff: What is the difference?

Q. Now, when you did that, did you get on the engine when yo started with him to Mansfield?

A. Yes, sir, I went up on to the engine and I talked to him an asked him who he was, what his occupation was, where his hom was and his age.

Q. For the purpose of what?

Objection; overruled.

A. For the purpose of making out a report to the superintende

Q. You sent in a report of the accident?

A. Yes, sir.

Q. And you got that information from him, did you?
A. Yes, sir.
Q. Did he talk to you?
A. Yes.
Q. Did he talk intelligently?
A. Yes, sir, pretty bright.
Q. What did he say his name was?
A. Well, he said his name was Byron Marietta, he said his age was 19, he said he staid with his uncle, a man named Philip Hecht, in a white house on the south side of the track, west of the tower house. He told me he worked for Kyle on the Pavonia section. We shoved on up the hill till we overtook the fellow ahead of us, the train there was stalled.
Q. Did you take this young man on the Mansfield,—did you bring him on your engine to Mansfield?
A. No, we didn't.
Q. Tell why.
A. Well, we ran again the other fellow there and an engine is no place for a man to ride that is hurt, so we took him out of the cab and took him over to the caboose and laid him down on a cushion.

Q. That was the same train that had been stalled before,—
210 you found it stalled a second time.

A. Stalled a second time.

Q. Then what did you do in the way of pushing up the other fellow over the hill?
A. We pushed him to the top of the Summit, New Summit.
Q. You put this young man in the caboose?
A. Yes, sir.
Q. And pushed the head train up the hill with your engine and then went back a second time?
A. We went back a second time.
Q. Do you know whether there was something the matter with the engine of the other train that made some difficulty in moving the train?
A. I don't know exactly what was the matter with it, they only had a short train.
Q. Do you know that that engine was taken off at Mansfield?

Objection; How would he know.

Q. Didn't you follow up after you got your train?
A. We went back and got our train and came right on through.
Q. What time was it when you first saw this young man on the engine? There was the first place you saw him, wasn't it, when they had him on the engine?
A. Yes, they had him on the engine.
Q. What time was that?
A. 6:05.
Q. And you put that down, did you?
A. Yes, sir.
Q. You mean by that standard time?

A. Yes, sir, standard time.

Q. When he was put in the engine, how near was the engine your train to Old Summit,—near, was it?

A. About 200 ft.

Cross-examination by Mr. Kerr:

Q. You say you were about half way along your train coming u

A. Yes, sir.

Q. Walking westward, when the engine came back?

A. Yes, sir.

Q. You weren't any nearer to the scene of the accident than th till you went up and found this boy on the engine?

A. No, sir.

Q. You don't know where he was struck except what you we told by somebody?

A. O, I walked around there and saw the marks in t snow.

211 Q. Did you see any blood on the track?

A. I didn't notice any blood.

Q. Did you see his dinner bucket?

A. After we went up the second time, we saw the dinner buck

Q. Do you know how far the dinner bucket was from the blood

A. I didn't see any blood. They had the man picked up in t engine, what blood I seen was in the caboose.

Q. His head was cut, wasn't it?

A. His head was cut and I pulled his mitten or glove off and couple of fingers were cut off.

Q. Found the fingers in the glove?

A. I couldn't swear as to that, I laid it down and——

Q. Do you say they were cut off?

A. Or badly mashed.

Q. Did you see any fingers up where they picked them up?

A. I didn't see any.

Q. From where he was dragged, wasn't that a good distance fro the dinner bucket?

A. I couldn't say.

Q. Wasn't it nearly 100 ft.

A. I couldn't say.

Q. Now, when the engine cut loose, you remained in charge the train?

A. Yes, sir.

A. The engineer then, from that time on, had complete control the movement of the engine, while the engine was loose from t train?

A. He was in charge of the engine when it cut loose.

Q. You had the train and were looking after the rear end an he was in charge of the engine?

A. Yes, sir.

Q. Did you have a fireman on?

A. Yes, sir.

Q. And the engineer had control of the fireman?
A. Yes, sir.
Q. He cut loose and ran up there and ran back with this fireman on the engine?
A. Yes, sir.
Q. Now, of course, you didn't look into any of those cars, you didn't know what was in them unless you could see in?
A. I kept a record of them.
Q. I am asking what you knew personally. You didn't
212 look into those cars that you were hauling?
A. We had the billing for them.
Q. I am asking whether you saw in them.
A. I could see what was in a coal car but a box car I couldn't see inside.
Q. The Railroad Company makes out those bills?
A. Yes, sir.
Q. You say one was to Hammond and one was to some place in Illinois—those were empty—did you see any others that you knew were going anywhere?
A. I only know by the billing.
Q. That's all you know about it?
A. Yes, sir.
Q. Now, how long have you been conductor?
A. For 6 years.
Q. This occurred 2 years ago?
A. 2 years the 5th of January.
Q. And it was at 6:05 by railroad time?
A. Yes, sir.
Q. And by sun time that would be 6:35?
A. 7:05 by our time now.

Redirect Examination:

Q. Was there any cross-over from one track to the other between the point where your train stopped and the engine was cut off and the new Summit at the tower?
A. No, sir.
Q. When you came back the second time, after pushing the train ahead of you over the Summit, what track did you come back on?
A. Came back on the west bound track.
Q. That is the only track you could come back on and be ahead of your train?
A. Yes, sir.

WM. SELLS was introduced as a witness on behalf of the de-
213 fendant and, being first duly sworn, was examined by Mr. Sidell and testified as follows:

Q. You were engineer on engine No. 1711, were you not, on January 5, 1912?
A. Yes, sir.

Q. That was a west bound freight train, was it not?
A. Yes, sir.
Q. When you reached what is called the old Summit tower—d you know where that is?
A. Yes, sir.
Q. It had been removed at that time, but still you knew whe it was?
A. Yes, sir.
Q. What, if anything, was there at that time that was differe or unusual?

Objection by plaintiff.

Q. Well, was there a train ahead of you, I will put it direct.
A. Yes, sir.
Q. In what condition?
A. It was stalled.
Q. What, if anything, did you do by way of assisting in th moving of the train ahead of you?
A. We got up against the caboose of their train and I told th conductor——
Q. Not the conversation—By that you mean you tried to sta the train and keep your train intact?
A. Yes.
Q. And you were unable to do it?
A. Couldn't do it.
Q. Then what did you do?
A. We cut our engine off and shoved him up.
Q. When you speak of cutting the engine off, does that inclu the tank as well as the engine?
A. Yes.
Q. The coupling between the tank and the engine is somewh difficult to make, so you cut off the engine and tank too?
A. Yes, sir.
Q. Where did your train stand with reference to the old Summi tower at the point where you started to help the train ahead of yo up the hill?
A. The head end of the train stood right at the tower.
214 Q. Do you know where the brick house is on the nort side of the track?
A. Yes, sir
Q. Do you know where mile post 263 is or was?
A. 263 is west of the brick house on the north side of the track
Q. Now, where is that arch where the highway goes under th railroad at a grade entirely different from the railroad—does it d that?
A. Yes, sir.
Q. How far was that and which way from the brick house?
A. Well, that is east of the brick house just a short distance, th brick house yard goes right up to it.
Q. Goes right up to the road?
A. Yes, sir.

Q. And the road goes under the track?
A. Yes, sir.
Q. After you moved up that far, did you cut off there?
A. We cut off.
Q. Now, who was it that cut off your engine from the caboose ead of you?
A. The brakeman.
Q. The head brakeman?
A. Yes.
Q. Where was he riding at that time?
A. On the pilot.
Q. You cut off at what time—what is it that indicates where u cut off.
A. Well, by our judgment, whenever we have got him started ough to help him up we cut off.
Q. That is determined by you?
A. Yes, sir.
Q. You concluded that he had a start, that he could get up the ill?
A. Yes, sir.
Q. Of course, you wanted to get back to your train?
A. Yes, sir.
Q. Now, in order to give the head brakeman notice as to when u wanted to cut loose from the other train ahead of you, what d you do?
A. Just whistled "Back up."
Q. That is a signal to him to make a cut?
A. Yes, sir.
Q. That is, to raise the lever so as to detach you?
A. Uncouple from the train ahead.
Q. Did he do that?
A. Yes.
Q. And that was done, you say, practically at the road crossing?
A. Just east of the road crossing.
Q. Where the railroad goes over the highway?
A. Yes, sir.
Court: How near is that road crossing to this mile post 263—st or west of it?
A. East of it.

Mr. S.:

Q. Now, at that time, did you know anything about train 14?
A. No, sir.
Q. When you cut off, how far were you from your own train that u had left standing, about how far?
A. About half a mile.
Q. Could you see it?
A. Yes.
Q. Was there any time in your movement to help the head train p the hill, when by looking back you couldn't see your train?

A. No, I don't think there was. Of course, I don't know f sure.

Q. As you looked back, you could see your train as you we backing up to connect with your train?

A. Yes, sir.

Q. About what speed did you go back?

A. 8 or 10 miles an hour.

Q. Who were on the engine at the time?

A. The fireman, brakeman and myself were on the engine.

Q. The fireman was on which side?

A. On his side, the left hand side.

Q. As you were going up the hill, going west, that would be the south side, would it?

A. South side.

Q. And which side were you on?

A. Right side.

Q. As your train was headed west, that would be the north sid would it?

A. Yes, sir.

Q. And going back, although your engine was going in an eas erly direction, still right hand and left hand are determined by th head of the engine, are they not?

A. Yes, sir.

Q. And you remained in the same position?

A. Yes, sir.

Q. Where was the brakeman coming back?

A. On the pilot.

Q. What if anything did he have in his hand by way of giving a signal, etc.?

A. He didn't have anything.

Q. He had a lantern?

A. No, sir, he didn't have any night signal with him.

216 Q. Why?

A. It was daylight.

Q. Now, he rode where in going back?

A. On the pilot.

Q. In going back, did the Wells-Fargo train pass you?

A. They passed us somewhere on the way going back, I couldn't just state where.

Q. Did you look to see just what time of day it was at the time of the accident?

A. I did not.

Q. At any time in that half mile run, what do you say as to the rate of speed at any place? What would be your judgment as to the rate of speed that you moved that day?

A. Well, not over ten miles an hour.

Q. At any place?

A. No, sir.

Q. It was down grade as you went back, was it?

A. Yes, sir.

Q. A frosty, cold morning, was it?
A. Yes.
Q. What is the fact in relation to the stopping of a light engine and a train, what is the difference, if any, as to the difficulty?
A. Why, the light engine is more difficult.
Q. That is, with the air brake?
A. Yes, sir.
Q. Can you explain the reason for that, why that is?
A. You have less braking power to brake off with.
Q. And to connect on to your train your engine must be under very accurate control?
A. Yes, sir.
Q. In going down hill, the speed of your engine would be controlled accordingly?
A. Yes.
Q. Did you see this man before he was injured?
A. I did not.
Q. How were you advised of anything unusual?
A. The brakeman hollered and gave a signal to stop.
Q. What did you do by way of stopping the engine
A. Put on the air.
Q. And stopped?
A. Yes, sir.
Q. What was done by way of putting the injured man on the engine?
A. Do you mean how did we take care of him?
Q. He was put on the engine?
A. The fireman and I picked him up and carried him back to the engine and laid him up in the engine.
Q. Where did you start then?
217 A. The conductor came up and we started to take him to Mansfield or wherever we could get to as quick as possible. We caught up with this other train just up at the brick house.
Q. And then you transferred the injured man to the other train?
A. Yes, sir.
Q. And then you helped that train up to the Summit?
A. Yes.
Q. And then what did you do in the way of taking the engine back to your train?
A. Went back on the same track.
Q. Was it possible to go back on any other track?
A. No, we couldn't get on to the other track.
Q. How long had you been running on that part of the railroad at that time?
A. I have been running an engine since 1910. With firing I have been here all told 12 years.
Q. All these years were you on this division?
A. Practically so.
Q. From Galion to Kent?
A. Yes.

Noon.

Q. Did you hear Mr. Marietta talk any as to what his name wa where he lived and things of that character?

A. When I went to him I asked him what hit him and he sai he didn't know. I asked him what his name was and he told me.

Q. What else do you remember that he said?

A. He spoke about that he was freezing and about his back hurt ing him. That's about all I remember of.

Q. You went back, did you, immediately? When you got th signal from the brakeman you stopped and then immediately got o and went back, did you?

A. Went ahead.

Q. Went ahead, as you call it, to where he was. Did you mov your engine or did you carry him?

A. Carried him to the engine.

Cross-examination by Mr. Kerr:

218 Q. From the time you whistled to cut loose from the freight train, did you give any other signals of any kind, from that time till you ran over this boy?

A. No, sir.

Q. Now, the brakeman was on the pilot of the engine from the time you cut loose from the freight train till you got down to where you stopped?

A. Yes, sir.

Q. And the pilot of the engine was on the rear end as you ran down?

A. Yes, sir.

Q. You were running backward?

A. Yes.

Q. You didn't see him and the fireman didn't see him?

A. No, sir.

Q. The brakeman saw him come out from under the pilot?

A. I couldn't say.

Q. Didn't he say that when he was telling you about it?

A. I don't remember that he did.

Q. You found him in the middle of the track?

A. Lying cross-wise on the track.

Q. Right in the middle of the track?

A. Yes.

Q. Don't you know that the brakeman saw him come out from under the pilot of the engine?

A. I don't know as he did, he hollered that there was a man hurt or something, gave a signal to stop and said somebody was hurt.

Q. And you went back and found him in the middle of the track?

A. Yes, sir.

Q. Now, then, you run from Galion, Ohio, to Kent, Ohio?

A. Yes.

Q. That was your run at that time?
A. Yes, sir.
Q. And this engine that you were running ran from Galion to Kent?
A. They ran both ways, the engines did, whichever way they wanted to run them.
Q. Sometimes they went to Marion, Ohio?
A. Yes, sir.
Q. Now, in running backwards, the pilot of the engine faced west?
A. Yes.
Q. What did you have on the rear of the cab between the cab and the tender, what kind of a partition?
A. The back part of the cab.
Q. Being winter time, that was closed up, that open space
219 where the fireman puts in the fire?
A. Yes, sir.
Q. How wide is that space where he puts in the fire?
A. I couldn't tell you that, they are different widths.
Q. But on this engine you were running, was it 3 ft. wide?
A. That I couldn't answer, I don't remember.
Q. Well, it was a solid partition that closed the rear end of the cab for winter service, didn't it?
A. I couldn't tell you particularly, I don't remember.
Q. And window in the rear end of it?
A. Yes, sir.
Q. A little square window up where you are?
A. Yes, sir.
Q. How far can you see back from that little window?
A. Well, you can see back from the top of the tank as far as your vision would carry.
Q. Now, of course, if it was daylight at this time, the brakeman wouldn't have a lantern?
A. It was just getting nicely daylight.
Q. You didn't get any lantern signal or anything?
A. No, sir.
Q. You could see as well as the fireman and neither you nor the fireman saw this boy, although he was on the track?
A. I didn't see him.
Q. Nor the fireman didn't see him.
A. I don't know.
Q. Was he putting in fire or sitting up on the seat?
A. I don't remember. He wasn't putting in fire, though, because it was down hill.
Q. Were you using steam when you were going down?
A. No, sir.
Q. Gave her a pretty good start, didn't you?
A. Just drifting,—gave her a little start and then drifted down hill.
Q. An empty engine won't run very fast down grade?
A. No, it won't run very fast.

Q. Just drifted along?
A. Yes, sir.
Q. Now, you think you can stop a heavy train quicker than you can a light engine?
A. Yes, in comparison.
220 Q. O, in comparison, of course. Is that what you mean? A while ago you said you could stop a heavy train quicker than you could a light engine.
A. It is harder to stop a light engine than it is a heavy train, in comparison.
Q. You couldn't stop a 30 car train in any where near as short a space as you could an empty engine?
A. No, you couldn't do that.
Q. The action of the brakes is more than overcome by the enormous weight of the train going down grade?
A. The weight of the train, of course, would have a tendency to keep it going.
Q. You had air brakes on the engine?
A. Yes, sir.
Q. Do you say, with air brakes on the engine, that by reversing you couldn't throw her forward, if you were backing,—do you say you couldn't stop in a car length running 8 miles an hour?
A. O, you could reverse the engine, you could stop it.
Q. If your fireman had been looking out and had seen this boy 100 feet ahead, you could have stopped the engine easy, couldn't you?
A. I could.
Q. Now this underground road crossing, I don't understand which way that was from the brick house.
A. East of the brick house.
Q. Just a short distance?
A. Yes.
Q. A couple of hundred feet?
A. No, it is not that far. It is on a line with the brick house. Of course the house sets off the road back in the yard.
Q. And mile pose 263, which way do you say it was from the road crossing?
A. West of the road crossing.
Q. How near the brick house,—about opposite the brick house?
A. I think it is just a little west of the brick house.
Q. Now, the next mile post or half mile post 262½ is probably 100 or 150 ft. from the Hecht private road crossing?
A. I think the half mile post is down nearer the tower.
Q. Isn't it within 100 ft. of this drive or road crosing?
221 A. The half mile post?
Q. Yes.
A. I don't know just what distance it is.
Q. Well, they indicate ½ mile apart?
A. Yes.
Q. You say mile post 262 is east of the old tower?
A. Yes.

Q. Now, of course, as engineer of the road, you have a book of rules of the Erie Railroad?
A. Yes, sir.
Q. Do you carry them with you?
A. Yes, sir.
Q. In your pocket?
A. Yes, sir.
Q. Do you remember Rule 634 on page 126 of the Book of Rules?
A. Not by number.
Q. Do you know what that refers to now?
A. I couldn't tell at the present time.
Q. When did you have your attention called to that rule?
A. At various times I look over them.
Q. Isn't this in regard to running an engine backward?
A. There is a rule with regard to backing an engine up.
Q. There is a general rule on the Erie, isn't there, that when you back an engine you should place some where on the front of it a watch out?
A. No, sir, we don't have anybody on the back end of it.
Q. You don't think but what a man can ride on the rear end of a tender?
A. I suppose he could.
Q. You have seen them many a time standing upon a tender and riding that way?
A. I don't know as I ever did.
Q. You have seen a brakeman sitting on top of a tender many a time?
A. I have seen people sitting on there, I don't know who they were?
Q. Don't a brakeman, once in a while, sit on something back there?
A. Not very often.
Q. Well, he could, couldn't he?
A. O, he could if he wanted to.
Q. If this brakeman, instead of being on the rear end of the engine going east, on the pilot, had been out there on the tender, he could have seen anybody on the railroad, couldn't he?

To which question defendant objected, the court overruled
222 the objection and defendant then excepted.

Q. He could have seen along the track and notified you, if you did not look yourself, couldn't he?

Objection; overruled; exception by defendant.

A. Yes, sir.
Q. If he had been there?
A. Well, if anybody had been there he could have seen.
Q. That fellow that was sitting on the pilot could have gone back and sat on the tender and looked out,—couldn't he have done that as a matter of fact?

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. Well, as a matter of fact, he could but it is not practical.
Q. Why not?
A. Because it is not practical.
Q. Practical or not, he could have done that in a case where you were running the wrong way on the track, backing the engine?
A. We are accustomed to do it the way we did that day.
Q. I am talking about what you might have done to have saved this boy and kept from running him down. If the brakeman had been on there looking that way, he could have seen this boy 100 ft. or so ahead and given you a signal.

Objection.

Q. Now, he could have stood in the gangway of the engine and looked east?
A. That is not practiced either, it is against the company's rules.
Q. You have seen brakemen standing there many a time, they do stand there notwithstanding the company's rules?

Objection; overruled; exception by defendant.

A. I don't know whether I have ever seen anybody standing there.
Q. He could have stood anywhere about the tender or gangway or back of this enclosure that shuts in the cab, and he could have looked back and notified you if there was anybody in the way, couldn't he?

Objection; overruled; exception by defendant.

223 A. Well, I don't know how that would be unless, as you say, he stood on the back end and that is not practicable.
Q. He could have stood outside of this thing enclosing the cab?
A. There is no place to stand.
Q. Where does the fireman stand when he puts in the fire?
A. At the end of the tank.
Q. This brakeman could have stood there?
A. You can't see back from there, it is not practiced.
Q. As an engineer, you knew that the section men walked back and forth on the track going to and from their work?
A. I did not.
Q. Never saw section men walking along there?
A. I might but I didn't know who it was.
Q. Well, you saw men, you knew that men were likely to walk along there?
A. We saw trespassers on the track occasionally.
Q. Do you think a section man going to work down the track is a trespasser?

Objection.

Q. Do you say that, in all the time you went along there, that you never saw Jennings that lived in the Brick house, or this man

Arnold, or any of these other men, walking on the track to their work and from their work?

A. Not that I know of.

Q. Didn't you see the path coming from the Jennings house out to the track?

A. Not that I noticed.

Q. Well, you would have seen it if you had looked at it.

Objection.

Q. You could have seen it?

A. We don't pay any attention to that kind of stuff, that is out of our line of business.

Q. This house is on the right hand side and, as you were going along on the right hand side of the engine, if there was a path there you could have seen it, couldn't you?

To which question defendant objected, the court overruled the objection and defendant then excepted.

224 A. I suppose if it was in sight it could have been seen.

Redirect examination:

Q. You have an abundance to look after on your engine, do you?

A. Yes, sir.

Q. To see that everything is in working order. Was this at a time of day when you had any reason to expect section men to be on the track?

To which question plaintiff objected, the court sustained the objection and defendant then excepted, offering to prove that this was at a time before men were expected to be on the track as workmen.

Q. Can you see over the tender of the engine, as a rule, to see the track, until some little distance away from it?

A. Well, some little distance away we have to be.

Q. And that would be whether you were on the fireman's seat or engineer's seat?

A. Yes, sir.

Q. Is there any difference in the cab between the fireman's side and the engineer's side?

A. They are the same only fixed a little different inside.

Q. Both have windows in both directions?

A. Yes, sir.

Q. As you went up with the engine, did you see anybody moving around at all?

A. I did not.

Q. And in going back you have already said that you could see clear down the track to your train.

Recross-examination:

Q. When you cut loose and started back, didn't you see Jennings going up the track?

A. No, I didn't.

Q. If you had looked, you could have seen him?
A. I didn't see him.
Q. Where were you looking, were you looking straight ahead?
A. I could see down the track.

Q. You say you couldn't see over the tender. Now, it was
225 a cold morning and you had all the windows of the cab shut. You didn't stick your head out of the window to look ahead, you were snugly fixed inside and had the windows shut?
A. I had not.
Q. Were the windows open?
A. Yes.
Q. Did you have your head out of the window?
A. Yes.
Q. If you put your head out of the window, you can see along the track?
A. Along the side of the track.
Q. You can see the track within ten feet of the tender, out of the window?
A. No, sir.
Q. There was a little curve on the side the fireman was on and he could have seen ahead if he had had his head out of the window?
A. I won't make a statement about the fireman. I don't know whether he was at the window or where he was.
Q. Did he have his window open?
A. He undoubtedly did have.
Q. I am asking whether he did or not.
A. I couldn't state.
Q. You had your head out of the window looking back?
A. I did.
Q. And yet you say you didn't see this boy?
A. I did not see him.
Q. It was plenty light enough to see him?
A. Yes, sir.

226 GEORGE M. SCHELB was introduced as a witness on behalf of the defendant and, being first duly sworn, was examined by Mr. Sidell and testified as follows:

Q. On the 5th day of January, 1911, what business were you engaged in?
A. Fireman.
Q. On what engine?
A. 1711.
Q. Your train was going which direction?
A. West.
Q. When you got to what was called Old Summit tower, did your train stop there?
A. Yes, sir.
Q. What occasioned it to stop?

Objection; overruled; exception by plaintiff.

A. There was a train ahead of us.

Q. What did you do?
A. Cut off the engine and started to shove the train up the hill.
Q. Did you attempt to shove the train up taking your train with you?
A. I don't remember.
Q. But you do remember cutting the engine off?
A. Yes, sir.
Q. How far up the hill did you take it?
A. About half a mile.
Q. Do you know where the highway goes under the railroad?
A. Yes, sir.
Q. A stone arch, I think they call it. Now, where did you stop to go back as to that point, where the road goes under the railroad?
A. We were up right along in front of the brick house.
Q. Now, when you got up there, where were you, what part of the engine?
A. On the left side.
Q. What is called the left side of the cab?
A. Yes, sir.
Q. And did you go back or start to go back to your train?
A. After we cut off we did.
Q. From your place in the cab, what do you say as to whether or not you could see the train?
A. We could.
Q. And was there any time that the train was out of sight, providing you had been looking in that direction?
227 A. No, sir.
Q. Did you remain in the fireman's cab while you were going back?
A. I was on the left side and on the deck, both places.
Q. Going up did you see anybody?
A. No, sir.
Q. Did you see anybody coming back?
A. No, sir.
Q. I mean, of course, on the railroad. About what rate of speed did your engine move back?
A. Not over 8 or 10 miles an hour.
Q. Do you remember of train 14 passing you?
A. Yes, sir.
Q. Do you remember where it was, had you started before you saw 14?
A. We had started down the hill when they passed us.
Q. When and from what source did you learn that somebody had been injured?
A. The brakeman hollered to the engineer that we had run over something.
Q. Where was the brakeman?
A. On the pilot in front of the engine.
Q. Do you remember what kind of a tank there was on the back end of the engine?
A. A square tank.
Q. Do you have square tanks and round tanks?

A. Yes, sir.
Q. Did you help carry the injured man?
A. I did.
Q. Who else carried him?
A. The engineer and I carried him.
Q. Did you move the engine back or did you simply carry him to where the engine had stopped?
A. Carried him to the engine.
Q. About how far was that?
A. About 3 or 4 car lengths.
Q. You put him in the cab, did you?
A. Yes, sir.
Q. And then where did you first start?
A. Started for Mansfield.
Q. Before you got to Mansfield you again came against this train ahead of you?
A. Yes, sir.
Q. Did you know of that train ahead being of the same class of train, is that right?
A. Yes, sir.
Q. And there was another back of you, wasn't there?
A. Yes, but I didn't see the one back.

Q. When you got up to the train ahead of you, what did
228 you do by way of transferring the injured man?

A. The engineer and, I believe, the conductor moved him over to the caboose.
Q. How far did you assist the train ahead?
A. Shoved them clear to the tower at the top of the hill.
Q. And when you did that, what did you do?
A. We went back down the hill.
Q. Going back on the same track that you came up?
A. Yes, sir.
Q. Was there any other way of getting there?
A. No other way.
Q. Did you hear any conversation of the injured man at that time as to what his name was and where he lived?
A. I heard the conductor ask him what his name was but I didn't understand it at the time.
Q. Did you hear any of the rest of the conversation?
A. When the engineer and I picked him up, the engineer asked him what hit him.
Q. What did he say?
A. He didn't know what hit him at all.

Objection; overruled; exception by plaintiff.

Q. Did you have occasion to look to see just what time it was?
A. No, sir.
Q. As to the report of an accident, that is done by the conductor?
A. Yes, he makes the report.
Q. Did you know, when you got to the new Summit tower over

the top of the hill, about telephoning or sending a message to have some one meet him here at Mansfield?
A. I don't know, I didn't get off the engine.

Cross-examination by Mr. Kerr:

Q. How long have you been in the employ of the Erie R. R. Co.?
A. September 9", 1911.
Q. Are you still in their employ?
A. Yes, sir.
Q. What are you doing now?
A. Firing.
Q. Were you a fireman in 1911?
A. Yes, sir.
229 Q. Do you still fire for Mr. Sell?
A. No, sir.
Q. How long had you been firing for him at that time?
A. That was the first time.
Q. Did you run the rounds with him?
A. Yes, sir.
Q. Now, when you pushed this train up to the brick house, you cut loose, you didn't stop to get uncoupled from the caboose, you gave them a push up and they went right on and you cut loose and went back?
A. Yes, sir.
Q. Did you put any fire in the engine from the time you cut loose to where you stopped after running over the boy?
A. I don't remember.
Q. You say you were part of the time on the deck and part of the time in the cab, what do you mean by that?
A. I said I was in the cab all the time, part of the time on the seat and part of the time on the deck.
Q. Going back?
A. Yes.
Q. Where is the deck?
A. The deck is between the two seat boxes.
Q. That is where you stand if you stand up?
A. Yes.
Q. That puts you higher than you were on the seat?
A. Lower.
Q. That was a cold morning?
A. Yes, sir.
Q. Did you have the cab window open on the side?
A. Part of the time, it was closed when 14 went past.
Q. So the cab window was closed when the train went past you?
A. Yes, sir.
Q. Did the engineer close his window or did he have it open?
A. I think his was open.
Q. How do you know?
A. Because he was sitting on the rail.
Q. Then he would be pretty well out of the window?
A. Yes, sir.

Q. That is, looking back. Now, looking back from there, you could see far ahead, couldn't you?

A. You could see as far as the train.

Q. Then he could see the railroad clear back there, couldn't he?

230 A. I don't know whether he could see the rails or not.

Q. You could see the track ahead of you, you couldn't look back and see the train and not see the track on the way back, could you?

A. Yes, sir.

Q. You could see back as far as where the train was standing?

A. Yes, you could see the train.

Q. And see the track all the way back?

A. No, sir.

Q. Couldn't you see the bed of the track?

A. The side.

Q. Wasn't there a curve so that you could see further than the engineer?

A. Not going back.

Q. What was in the way of your seeing?

A. There wasn't anything in the way.

Q. Why, you could see the track just as well looking out of the cab window when going backward as you could forward, couldn't you?

A. No.

Q. Why couldn't you?

A. Because it wasn't quite daylight enough to see that far.

Q. How could you see the train if you couldn't see the track ahead of you?

A. It had a background against the sky, you could see the cars.

Q. You could see the train but you couldn't see the young man 100 ft. ahead of the engine?

A. You could see a man, sure.

Q. It was plenty light enough to do that?

A. Yes.

Q. Now, the engineer looking out of the cab window, sitting on the rail where he rests his arm, and you looking back, and neither of you saw this boy, did you?

A. No, sir.

Q. It was so light that the brakeman didn't even need a lamp to make a signal, didn't have a lamp?

A. He did have a lamp.

Q. Had a lamp lighted?

A. Yes.

Q. You are sure of that?

A. Yes.

Q. He held it on the pilot of the engine or on the rear of the engine as it was running?

A. I didn't see him.

Q. The first that he saw or knew that he had run over some-

231 body was when the boy came out from under the engine?

A. That's what he said.

Q. And when you went back, you found him in the middle of the track?
A. Yes, sir.
Q. There was no need of the brakeman being on the pilot of the engine? He could have got over on to the rear of the tank and looked ahead, if there was any need of seeing anybody?
A. He could have.
Q. Are you sure whether you put in any fire or not going down?
A. No.
Q. Probably wouldn't. You say you were running 8 or 10 miles an hour.
A. Yes, sir.
Q. Did you and the engineer ever talk about how fast you were running?
A. No, sir, never talked to him since.
Q. Never said a word as to how fast he thought you were running?
A. No, sir.
Q. You just thought you were running about 8 or 10 miles an hour?
A. Yes, sir.
Q. If you were only going 8 or 10 miles an hour, you wouldn't need to put in any fire going down grade?
A. It is owing to how low the fire was.
Q. Now, the rear of the cab for winter service is closed in except where you go out to put in the fire,—isn't that boarded up?
A. Some of them are.
Q. How was this engine?
A. I don't remember.
Q. You don't even remember how the engine was rigged up in the rear?
A. No, sir.
Q. They are all shut up in the winter time, aren't they?
A. No, sir.
Q. Do you say that any of the engines are entirely open in the rear?
A. They have curtains that you can put down if you want to.
Q. They either have heavy canvas or boards?
A. Yes.
Q. The canvas you can spread apart or hook back?
A. It is only on the top, it is rolled up from the top to the opening in the back with a cap to fit over the end of the tank.
232 Q. So that you can get under it?
A. Yes.
Q. Do you remember whether this was canvas or not?
A. I don't remember.
Q. Did it have an opening back there, a window or anything?

Objection: Back where.
Mr. Kerr: He understands that.

Q. You understand that, don't you, a railroad man? In this canvas cover or boards, is there a window in there?

A. Windows in the back of the cab.

Q. Now, the thing that encloses it in, either canvas or boards, are there windows in that?

A. No, where the canvas is, that is open.

Q. If it was down on the tank, you couldn't see over the tank and on to the track, if it was down?

A. I don't know what you mean.

Q. You know what I mean. The rear of the cab in the summer time, you have that open, don't you, except something to lean back against. Now, then, this canvas that you speak of is attached to the back of the cab?

A. Yes, sir.

Q. And fastens on to the tank?

A. Yes.

Q. High enough up so that you can put the shovel back in there and put your coal into the fire?

A. Yes, high enough so that you can stand up under it.

Q. As high as the side of the deck?

A. Higher.

Q. So that you could see over the top of it?

A. No, you can't see over the top of the tank.

Q. So that the view to the back is shut off?

A. If that is down you can't see back at all.

Q. Some of them have a wooden enclosure, are there any windows through that in the rear?

A. No, the windows are at the side of the cab and fastened into the back of the cab.

Q. You can't see through that curtain when you look back out of the side windows?

A. There is a window in the back whether you have canvas
233 or wood or anything.

Q. Is that in both the engineer's side and the fireman's side?

A. Yes.

Q. On both sides?

A. Yes.

Q. So that if you look out either way, either on the side or back, you can see out, can't you?

A. Yes, sir.

Redirect examination:

Q. The top portion of the cab is frame work, isn't it?

A. Yes, sir.

Q. And the frame work in the rear comes down a certain distance, and then below that there are steps to go down to the lower level where you stand when putting in the fire?

A. Yes, sir.

Q. And the curtain you have been talking so much about has nothing to do with the frame work of the cab?
A. No, sir.
Q. In that frame work of the cab there is a window?
A. Yes, sir.
Q. Both in the front and the rear?
A. Yes, sir.
Q. And likewise one at the side that moves backward and forward?
A. Yes, sir.
Q. And the canvas is at the side, not of the cab proper but where you are standing between the engine part and the tank part—the two are coupled together, are they not?
A. Yes, sir.
Q. There is a little space between covered with an apron?
A. Yes, sir.
Q. Just a steel plate, and that lays right over that opening, does it?
A. Yes, sir.
Q. The curtains are at the sides of that, are they not?
A. There is a curtain in each gangway.
Q. That has nothing to do with the cab, has it?
A. No.
Q. Can you see the engineer's cab in an engine of that kind?
A. You can see about that much of it (indicating) back of the boiler.
Q. Can you see where he sits?
A. Yes, sir.
Q. Is that engine what you call a "Mother Hubbard" engine?
A. No, sir.
Q. If it had been one of those engines, the cabs are still further forward on the boiler?
A. They have separate cabs.
Q. Now, do you know where your engine was coaled that morning?
A. It was coaled at Kent.
Q. Was it coaled between Kent and Pavonia?
A. No, sir.
Q. At any rate, it was full of coal, was it?
A. Yes, sir.
Q. And then there was the water tank opposite that?
A. Yes, sir.
Q. Now, is it possible to see from the cab right back on the railroad track or some little distance back?
A. Some little distance back.
Q. That is, the tank of the engine obscures your view of the track itself for some distance?
A. Yes, sir.
Q. And that would be either from the engineer's seat or fireman's seat.

Q. And a person could be walking in the middle of the trac so that neither the engineer, looking out of his side, nor the fir man on his side, could see the man at all?

Objection; sustained.

Q. The tank of the engine, when you are backing up, is right i front of the engine proper?

Objection.

Q. I am asking, as a matter of fact, is the tank of the engine th same width as the engine proper?
A. Yes, sir.
Q. That is, the side?
A. Yes, sir.
Q. Now, what is the length of the tank in one of those larg engines, how long is the tank?
A. About 30 ft.
Q. The steel work of the square tank, is that as high as you cab or higher?
A. It is not as high as the roof, about as high as where we wer sitting on the seat box.
Q. How near the cab is the nearest end of the tank proper?
A. About 18 inches or two feet.
Q. In that class of tank, is the steel work in the rear as high as is in front? Suppose you had the tank cut off, is the rear of th tank, the steel part of it, as high as the front part of the tank
235 A. Yes, sir.
Q. Same level?
A. Some of them runs back a little higher.
Q. To keep the coal from running off, is that right?
A. Yes, sir.
Q. What I am getting at, is it possible from either side of the ca to look behind on the track and see the rails of the track until you line of vision carries you far enough away from it so that you ca see it.

To which question plaintiff objected.
Court: I will let him answer, although I suppose the jury would know that as well as the witness.
To which plaintiff then excepted.

A. You wouldn't be able to see behind it.

Redirect examination:

Q. So you were running the engine backwards down the trac and neither yourself nor the engineer could see the track,—is tha what you mean?
A. Not behind the tank.
Q. How far behind the tank?
A. That would be hard to judge.
Q. The cab is wider than the tank, isn't it?

A. I don't believe it is.
Q. Do you swear the cab does not extend out wider than the tank, the place where you sit or stand, especially the seats?
A. Not wider than the tank.
Q. When you get up to the seats, to look out, you can extend your head out a couple of feet?
A. You are not supposed to hang out.
Q. Was the engineer hanging out?
A. No, he was sitting out.
Q. He was looking out at the side?
A. Yes.
Q. Did he have his head out?
A. He did.
Q. How far did he have his head out?
A. I don't know.
Q. Didn't you see him?
A. Yes, but I don't know how far he had his head out.
Q. You looked over to see him, did you?
A. I saw him sitting there.
Q. How far did the boiler head of this engine extend back through the cab?
A. About $\frac{2}{3}$ the length of the cab.
Q. So there was about $\frac{1}{3}$ of it open between you and the engineer and you could see right across?
A. Yes, sir.
Q. Could you see up to the roof?
A. On top of the boiler there was a space.
Q. If you would stand up on that you call the deck, you could see across the boiler over on to the engineer's side?
A. When you are on the deck, you are on the back of the boiler.
Q. When you are on the deck, you are not inside of the cab proper?
A. No, sir.
Q. Well, the seats, are they inside of the cab proper?
A. Yes, sir.
Q. Now, then, how far is this where this occurred from Kent?
A. About 75 miles, isn't it?
Q. How far is it from Galion to Kent?
A. 91 miles.
Q. Then it would be about 70 miles. How far is it from here to Galion,—18 miles?
A. I believe it is 16 miles.
Q. You take enough coal at one end to run to the other end?
A. Yes.
Q. So you had gone about ¾ of the distance and didn't have so much coal out there?
A. In the back end of the tank, it was piled up against the tank.
Q. It wasn't piled up so that you couldn't see over?
A. If there wasn't any coal in at all, you couldn't see out that way.
Q. You would have to get out at the side in order to look out at all?

A. You could stand in the gang way.
Q. You could have stood in the gangway and looked back?
A. Yes.
Q. Neither you nor the brakeman had anything to do, you coul have stood in the gang way and looked back? You could have gon to the right side and the brakeman could have looked out to s whether there was anybody on the track?
237 A. If I had known there was anybody there, I would hav looked out.

HOMER NESS was introduced as a witness on behalf of the defen ant and, being first duly sworn, was examined by Mr. Sidall an testified as follows:

Q. Mr. Ness, on the 5th of January, 1912, what were you e gaged in?
A. I was engaged in braking.
Q. On a train with engine 1711?
A. Yes, sir.
Q. You were head brakeman, were you?
A. Yes, sir.
Q. When you reached Old Summit tower, what if anything w done?
A. We cut off there and shoved the other fellow up the hill.
Q. Helped another train up the hill?
A. Yes, sir.
Q. How far did you go in helping that train up the hill?
A. From Old Summit tower to the brick house.
Q. Where did you ride?
A. On the pilot of the engine.
Q. Going up?
A. Yes, sir.
Q. As you rode up on the pilot of the engine, did you see anybod
A. No, sir, I didn't.
Q. Did you have any lantern?
A. Yes, I had.
Q. A lighted lantern?
A. Yes, sir.
Q. What was the condition of the time in the morning as to da light?
A. I should judge about 6:05 or along there.
Q. I don't mean the time exactly, I mean was it just getting da light?
A. Just breaking day.
Q. Now, when you got up to the brick house, as you designa it,—you were familiar with the brick house?
A. Yes, sir.
Q. Kind of a land mark that you had to speak of in locatin places?
A. Yes, sir.
Q. Did you use the lever to cut loose from the train you we helping?

A. Yes, sir.
Q. How did you know when to do it?
A. The flagman and conductor of the other train were on
38 the rear platform, the conductor told me to cut it off and I gave a signal to our engineer to back up.
Q. Did the engineer act in response to the signal?
A. Yes.
Q. And you cut loose?
A. Yes, sir.
Q. Now, where did you go while this engine was being taken back moved back in the direction of your train?
A. I rode on the pilot of the engine.
Q. On which side?
A. The engineer's side, the right side.
Q. That is, the right hand side as the engine headed?
A. Yes.
Q. Which side by points of the compass?
A. The north side.
Q. And on the side of the brick house?
A. I was on the side of the brick house.
Q. Did you see anybody at all?
A. No, sir, I didn't see anybody.
Q. Outside of the train men you have already testified to?
A. No, sir, I didn't.
Q. Did you stand on the pilot all the way going down there?
A. Yes, sir, I did.
Q. About what rate of speed was your engine moving?
A. Not over 8 miles an hour.
Q. I mean when you first saw something, when you gave the signal stop the engine.
A. When I first saw it,—I was standing on the pilot of the engine and I felt something as if we was on the ground. I happened to look back and I saw his feet come out from under the engine. I hollered to the engineer to stop. He wanted to know what was the matter and I said "I believe we have run over a man" and we went back and looked and I saw we had.
Q. And you found Mr. Marietta?
A. Yes, I found him.
Q. Then you put him on the engine and started for what place?
A. I started back to the caboose to tell the conductor.
Q. After you had gotten him on the engine, where did you start or, where were you going?
A. Going to Mansfield.
Q. For the purpose of bringing the injured man here?
A. Yes, sir.
39 Q. In that way you again came against this same train, did you?
A. Yes, sir.
Q. Did you know Marietta?
A. No, sir, I never saw the man.
Q. Did you hear him tell who he was?
A. Yes, sir.

Q. And where he lived?
A. Yes, sir.
Q. When you came to the train that you helped, what was done with the injured man, Mr. Marietta?
A. Well, we shoved the other train up to Summit and then we stopped and took the injured man to the caboose of the other train and they took him to Mansfield.
Q. Then what did you do?
A. We backed down to our train.
Q. On the same track that you went up?
A. Yes, sir.
Q. At the time you cut the engine off from your train at Old Summit until the time that you started to go back the first time, to connect with your train and move it forward, could you see the train where you had left it standing?
A. I don't remember that, I couldn't say. I was on the front of the engine.
Q. What I mean is, were you at such a point on the engine as to know whether or not, being up in the cab, you could see the train where you had left it down below Summit?
A. Yes, sir.

Cross-examination by Mr. Kerr:

Q. It wasn't very dark, then, if you could see the train down at Old Summit from where you were,—it was quite light, wasn't it?
A. Well, you could see our train down there. It was just daylight.
Q. Then you could easily see a man on the track if you had been looking?
A. I didn't see any man on the track.
Q. You were on the pilot of the engine so that you couldn't see the way the engine was going at all, from your position? The engine was between you and the way it was going?
A. Yes, sir.
Q. When it cut loose from the freight the engine stopped, of course, before it went back?
A. Yes, sir, it stopped.
Q. And it stopped long enough for you to go back on the
240 engine to look back and see if there was anybody in the way?
A. I suppose I could, yes.
Q. You hadn't any business on the pilot going back, had you. There wasn't anything for you to do there?
A. No, but we were accustomed to ride where the most convenient place was.
Q. How far do you say it was from where you cut loose to where you say this boy's feet came out from under the pilot?
A. Well, I should judge it wasn't over 3 or 4 car lengths.
Q. You know where that road crossing goes down through the Hecht place, that private crossing east of the brick house? Do you say it was 3 or 4 car lengths from where you started to where you

saw this boy's feet come out from under the pilot, is that what you mean?

A. It was below the road crossing where I saw the young man's feet come out from under the pilot.

Q. Then it was probably ⅛ of a mile. That road crossing is ⅛ of a mile from the brick house, isn't it?

A. I couldn't say.

Q. You don't remember about that?

A. No, sir.

Q. Anyhow, in going down there, you felt the pilot of the engine as though it was scraping on the ground?

A. Yes, sir.

Q. There was an object, evidently, under the engine.

—. ——.

Q. Then you saw his feet coming out and you signalled to the engineer?

A. Yes, sir.

Q. And you went back and found him lying in the middle of the track?

A. Yes, sir.

Q. Did you look to see any of his clothing or effects about?

A. No, sir, I didn't at the present time.

Q. Did you see his dinner bucket?

A. Yes, sir.

Q. Where was it?

A. Within a car length or so from where we found him.

Q. About 3 car lengths, wasn't it, from where you found him?

A. Well, I wouldn't say as to that.

Q. Was there some blood on the track where you picked him up?

241 A. Yes, sir.

Q. He had a gash in his head, didn't he, running back over the top of his head?

A. Yes, sir.

Q. Now, when you picked him up, you put him on the engine?

A. The fireman and engineer put him on the engine?

Q. And you went back, you say, to tell the conductor?

A. Yes, sir.

Q. Don't you think you were running as much as 9 or 10 miles an hour?

A. No, sir.

Q. Couldn't have been more than 8?

A. Not in my estimation.

Q. How long had you been railroading before this?

A. I should judge not more than 2 months.

Q. Are you still on the road?

A. Yes, sir.

Q. What are you doing now?

A. Braking.

Q. On this division?

A. Yes, sir.

Q. Do you know what type of engine this was?
A. No, I don't.
Q. Do you remember how the rear of the cab was arranged, whether it was open back or whether there was something in there in the rear of the cab?
A. No, I don't, I couldn't say.
Q. You were the head brakeman and you rode on the engine?
A. Yes.
Q. When you rode on the engine, on which side did you ride?
A. On the fireman's side, the customary place.
Q. Did you ride anywhere else only that?
A. That's the only place.
Q. When you would walk back on the train, you would walk back over the tank?
A. Go out on the gangway.
Q. You would have to go back over the tank to get on to the train?
A. Yes, if they were running.
Q. Now, are you real sure that you had a lantern at that time?
A. Yes, sir.
Q. Did you give him a signal that morning?
A. Yes.
242 Q. What did you do?
A. Gave a signal to stop and hollered to the engineer.
Q. What did you do, what motion did you make?
A. Told him to stop, and swung the lantern.
Q. Was that before you cut loose or afterward?
A. That was after we cut loose.
Q. Of course, you did that on the side the engineer was on, so that he could see you swing your lantern?

[Not answered.]

243 ALBERT L. GREEN was introduced as a witness on behalf of the defendant and, being first duly sworn, was examined by Mr. Sidell and testified as follows:—

Q. What were you doing on the 5th day of January, 1912, at the time a man was injured near Pavonia,—do you remember that morning?
A. I will answer that question directly. I did not hear of the accident until several weeks afterward.
Q. You were engineer of what train?
A. No. 14.
Q. Have you examined any book that you kept or anything that indicates the time that your train passed the tower at Summit?
A. No, sir.
Q. Have you any recollection of it?
A. No, sir.
Q. Do you remember about daylight that morning meeting a train that had an engine in front and one at the rear?

Objection; sustained; exception by defendant.

Q. Do you remember the fact of passing this train?
A. Yes, sir, that kind of a train.
Q. Is there anything that you now recollect in relation to the accident or that has some bearing upon the accident?
A. None whatever.

244 WILLIAM KYLE was introduced as a witness on behalf of the defendant and, being first duly sworn, was examined by Mr. Sidell and testified as follows:—

Q. State your name.
A. William Kyle.
Q. You are and have been for some time section foreman from Pavonia up to the Summit Tower?
A. Yes, sir.
Q. How long have you been engaged in railroad track construction?
A. Well, I have been about 13 years foreman and I worked about 7 years before that,—about 20 years altogether.
Q. In your experience, have you been engaged in the actual construction as well as the repair of railroad tracks?
A. Yes, I have assisted.
Q. What is the distance from center to center or from *guage* to *guage* in railroad tracks, main tracks?
A. 13 ft.
Q. What is the standard *guage*?
A. 4 ft. 8½ in. or 56½ in. That is the standard *guage*.
Q. What is meant by *guage* in a railroad track?
A. The width of the rails apart.
Q. The distance between the inside of the two rails apart?
A. Yes, sir.
Q. The Erie is a standard track?
A. Yes, sir.
Q. Are these parallel tracks in your section built upon the dimensions you have named?
A. Yes, sir.
Q. Both as to the *guage* of the tracks and the distance between the tracks as they parallel each other?
A. Yes, sir.
Q. What is the width of the ball of the rail?
A. Well, about 2¼ in., as near as I can make it.
Q. So that two rails would be 4½. What space does that leave between the nearest portions of the rails of parallel tracks?
A. Well, it is practically 8 ft., it is 7 ft. and 11 in.
Q. And that is the way all of this construction on that section is made?
A. Yes, sir.

245 Q. Did you ever say to Mr. Marietta, when you hired him, that he should go down the track or go up the track or anything of that kind?
A. No, sir.

Q. Did you ever say anything of that kind to him?

A. No, sir.

Q. While Marietta was working there on the section under you, what did you say to him and the others in relation to when they should get off the track or get away from the trains,—what did you say in relation to that, what did you tell them, if anything?

A. I told them to clear the tracks, to get off the way, to get out of the road of the trains, to get off the right of way, or something like that,—to clear the tracks or something like that.

Q. How many times did you tell that when you were directing Marrietta as well as any other one of the employes there?

A. Everybody I met I spoke of that.

Objection; sustained.

Q. How frequently did you say that to the men, including Marrietta?

A. Whenever there was a train coming or approaching on the track that he was working on.

Q. What is the length of a tie?

A. 8½ ft.

Q. How far do they extend beyond the rail, between the two tracks?

A. About 19¾ inches, about that, as near as I can tell.

Q. During the last two or three years, are ties of uniform length or do they vary?

A. They vary some, some are a little longer and some a little shorter, you know.

Q. On January 5th, 1912, how far east had the double track been constructed, the second track?

A. Well, practically on through. There was a gap left at the Black Fork bridge, as we called it.

Q. That was at what mile post?

A. 260.

Q. Now, from that point west to the Old Summut Tower, as we call it, how long had that track been fully completed?

A. From the Black Fork bridge, post 260, to the Old Summit Tower.

246 Q. That is 262½?

A. Well, that hadn't been completed a great while before that. It had been open a while before that.

Q. Was the second track the east bound or west bound track?

A. East bound.

Q. In constructing the second track, did you know enough about the movement of trains or operation of trains to know in relation to "slow orders" until the track becomes thoroughly settled, grounded and lined up and all those things?

A. They usually put out "slow orders" if necessary.

Q. Do you know whether there had been a "slow order" commencing at Old Summit Tower on the east bound track, being the second track at that time?

I think there was a "slow order" on there at that time be-
the track had not settled.

Cross-examination by Mr. Kerr:

Now, you know where the brick house is on the north side of
ack, where Jennings lived? Do you know where that is?
Yes, sir.
How far is that from the Hecht road crossing?
O, it is probably 700 or 800 ft.
How far is it from the Hecht road crossing down to the little
ust there by the Robinson farm, if you know where that is,
this woods on the north side? There is a little patch of woods
?
Yes, sir, where there is a runway under the track.
How is it from there down to the cut?
Well, I would judge it would be 1,200 ft. anyhow, probably
than that.
Now, from that cut to this little patch of woods on the north,
far is it from there to where the Old Summit Tower used to
l? As you enter it going east, how far is it from there on to the
Old Summit Tower?
A. O, well, it is pretty hard to tell just how far that would
be. I can only make a rough guess at it.
Well, make a rough guess,—400 or 500 ft.?
It is more than that.
600 or 700 ft.?
Yes, nearly a quarter of a mile.
Then it would be a quarter of a mile or 1,200 ft. up to the
nt road crossing, and then 600 or 700 ft. from there to the brick
e, you say?
. Yes, sir.
. Now, you knew that the section men came down over the tracks
ork every day and went back over the tracks every night?
. O, yes.
. And you told the men the night before this that they would
t to work at the Old Tower the next day, didn't you?
. I don't know that I did, no.
. Will you swear that you didn't?
. I don't know that I did.
. Well, when you worked out along the section, of course, they
wherever you were going to work?
. O, no.
. Did you ask these men living up at Jennings' to walk to
onia and then ride on the car to where you were to work?
. Certainly.
. You did that?
. Usually.
. Suppose you were going to work near Jennings' house, would
make him walk down there and then ride back?
. Yes, sir.

Q. If this young man lived on the Hecht place, and you were going to work 600 or 800 ft. from the crossing there, you would walk him down to Pavonia?

A. Yes, if I needed men down there, if I needed help to take the car out.

Q. You had a gasoline car, didn't you?

A. Yes, sir.

Q. And you had 3 or 4 men at Pavonia?

A. Yes, sir.

Q. That was enough to put it on with your help?

A. It took some hustling.

Q. You didn't lift any, did you?

A. Didn't I?

248 Q. Weren't four men and you enough to put that car on the track? Did you make these men walk down there to put on the car?

A. Yes, sir.

Q. And then help you wheel it to the place where you were going to work?

A. Yes, sir.

Q. It is two miles from Jennings' down to Pavonia?

A. Pretty near two miles.

Q. Then these men would all have to walk two miles of track?

A. They didn't have to walk on the track.

Q. You didn't tell them not to?

A. It was none of my business.

Q. Did you expect this young man to walk through the fields and woods?

A. That didn't concern me.

Q. The men that lived out there along the track didn't do that, did they? You knew they walked on the track?

A. I suppose so.

Q. You saw them walk the track?

A. Sometimes.

Q. May be you didn't get down there as soon as they did?

A. Well, sometimes I didn't.

Q. If you got there first, didn't you see them walking on the track?

A. If I got there first, I might happen to see them. If not, I don't know how they got there. I couldn't swear to that.

Q. You say when you were working on the track you would tell men to get off the track?

A. Yes, sir.

Q. That's what you meant when you testified?

A. Yes, always.

Q. Do you deny that you said when you hired him that when he went to work he should go down the track?

A. I never told anybody how to go.

Q. Did you tell this boy that?

A. No, sir.

Q. You deny that, do you?
A. Yes, sir.

Redirect examination:

Q. Where with reference to the Jennings' brick house is mile post 263?
A. Right square opposite.
Q. Which way from that mile post is the water arch to
249 let the creek through?
A. West of there is the water arch.
Q. Which way is the arch that accommodates the public highway?
A. Just east of the Jennings house.
Q. Is it a mile post or half mile post that is nearest to the Old Tower?
A. Mile post 262½ is the nearest.
Q. How near to Old Summit was and is post 262½?
A. Well, there is a case of guess again.
Q. O, well, you can come pretty close to it?
Q. Well, say 600 or 650 or 700 ft., somewheres in there, I can't tell exactly.
Q. Do you know where the quarter mile post is?
A. I do.
Q. Where with reference to the Hecht crossing and which way from the Hecht crossing is the quarter mile post?
A. It is east of the Hecht crossing, is where the quarter mile post is.
Q. How far?
A. O, say 300 or 400 ft., somewheres along there. That is something I never measured.
Q. When Old Summit Tower was removed further west, were the wires taken up by which the old tower was operated?
A. Do you mean the signal wires?
Q. The wires connected with the tower, of course?
A. Well, I am not positive about that, I can't answer that.
Q. Would those wires interfere with a person going along the track in any way?

Objection.

Q. How far did they extend from the tower, those wires?
A. Well, there is one signal there that don't extend a great ways out from the tower.
Q. Give us an estimate.
A. There's another matter of guess work.
Q. Give it as near as you can.
A. Well, I think what we call the home signal was about 200 ft. west of the tower.
Q. Not more than that, in your opinion?
A. No, it might not have been that far.

Q. On which side of the tracks were the wires or were
250 they on both sides?

A. They were on the south side of the track, outside of the track.

Q. And they did not extend west to exceed 200 ft., you say?

A. Not this home signal.

Q. When the tower was removed, of course that was of no use there?

Objection; sustained.

Recross-examination:

Q. You say the standard *guage* road is 4 ft. 8½ in.?

A. That's the standard *guage* of the track from the inside of one rail to the inside of the other in the same track.

Q. How far do you say it is between the tracks just as they are there, from the inner rail of one track to the inner rail of the other track, how far are the tracks apart?

A. About 8 ft. and 7½ in., somewhere along there.

Q. Do you know how far a passenger car extends over the rail?

A. That is something I don't know.

Q. Don't it extend over 2½ ft.?

A. I don't know that, I never paid any attention to that.

Q. You have seen a car come along and got away from the track?

A. O, thousands of them.

Q. But you never looked to see?

A. No, sir.

Q. You didn't take any interest in that part of it?

A. No, sir.

Q. Now, there was a signal at the Hecht crossing at that time that was operated from the tower?

A. Yes, sir.

Q. The wires ran clear up to the Hecht crossing operated from the signal tower, didn't they?

A. Yes.

Re-redirect examination:

Q. On which side?

A. On the south side of the track, called an outstanding or outlying signal.

Q. That is a single wire?

A. No, two wires.

Q. Is there one above the other?

A. Yes, close together.

Q. When were they removed, when the tower was removed?

A. Yes, shortly afterward or somewhere at that time. I can't tell exactly. I don't remember any more.

251 Q. What difficulty would there be in stepping right over the wires, if you wanted to step over them?

Objection; overruled.

Q. Have you stepped over them?
A. Many a time.
Q. Have you seen other men step over them?
A. Lots of them.

Counsel for plaintiff objected to the question and moved that the answer be excluded, but the court overruled the objection and motion and plaintiff then excepted.

A. L. GREEN was recalled on behalf of defendant, examined by Mr. Sidell and testified as follows:—

Q. Do you recollect, about the 5th of January, 1912, of a "slow order" on the east bound track about the Old Summit Tower, do you remember the double track right there, a new track?
A. Yes, sir.
Q. Now, was there a "slow order" on there?
A. There was a slow order, yes, sir.
Q. Now, as a consequence of a slow order, what effect does it have?

To which question plaintiff objected, the court overruled the objection and plaintiff then excepted.

A. Well, there is generally some cause for a slow order, the condition of the track generally.
Q. Well, what is a slow order?
A. Reduce the speed from your regular running time.
Q. To reduce the speed?
A. Yes, sir.
Q. When the slow order is up do you as engineer conform to that?

Objection.

Q. Did you on this day in question?
A. I would say that I did, yes, sir.

Cross-examination by Mr. Kerr:

Q. When you were on the stand before, you didn't even remember about the time of the occurrence, did you?
252 A. Didn't I say that I was on No. 14 that day?
Q. Yes, but you didn't remember anything about this accident. You said you were on the right hand side and this train was on the other side?
A. I knew nothing about the train whatever, no, sir.
Q. You didn't know anything about the accident?
A. No, sir.
Q. Then how do you know there was a slow up order on January 5th, 1912?
A. This was a new piece of track and the slow order had been existing for some time.

Q. The track had been built for a good while for a mile or more beyond the tower, hadn't it?
A. Yes, sir.
Q. Where is that order, some record of the company would show it?
A. Yes, the company has it.
Q. Do you swear that you had one, do you remember it?
A. I can say that I signed the order at the terminal.
Q. Where?
A. At Marion.
Q. You don't know whether you observed the slow order or not?
A. I did if I was making the usual time.
Q. How many miles an hour is the usual time?
A. About 40 miles an hour.

Redirect examination:

Q. Where did you leave train 14, where is your run?
A. My run is from Marion to Kent.
Q. Did you ever accompany the train that goes through to New York?

Objection; overruled.

A. I never did.
Q. When you leave the train, does another crew take it?
A. Yes, sir.
Q. Do you know it to be a Chicago-New York train?
A. Wells-Fargo Express from Chicago to New York.

Counsel for plaintiff objected to the question and moved to exclude the answer, but the court overruled the objection and motion and plaintiff then excepted.

253 Dr. WILLIAM E. LOUGHRIDGE was introduced as a witness on behalf of the defendant and, being first duly sworn, was examined by Mr. McBride and testified as follows:—

Q. State your name.
A. William E. Loughridge.
Q. What is your business?
A. Physician and surgeon.
Q. How many years have you practiced?
A. 33 years.
Q. Where?
A. One year at Pittsburgh and 32 years in Mansfield.
Q. What institution are you a graduate of?
A. Miami Medical College, Cincinnati, Ohio.
Q. Did you ever see Mr. Marrietta sitting here?
A. Yes, sir.
Q. When?
A. Well, I saw him in the hospital soon after he was injured and I saw him again on the 28th of last May.

Q. At whose instance did you see him on May 28th?
A. For the attorneys of the Erie Railroad.
Q. Did you make an examination of him?
A. I did, yes sir.
Q. How thorough an examination did you make?
A. Well, I made a very thorough one, I thought.
Q. What, if anything, was done with his clothing?
A. He took off his clothing and stripped naked.
Q. And then the examination was made?
A. Yes, sir.
Q. Have you any memorandum that you made as a result of the examination?
A. Yes, sir.
Q. If you desire, you may refresh your recollection from it. State whether or not you took his pulse at the time.
A. Yes, sir.
Q. Do you remember what it was?
A. Yes, sir.
Q. State what it was.
A. It was 80.
Q. State whether that is normal or not.
A. Well, under certain conditions it is normal.
Q. Did you take his temperature?
A. I did, 98 2/5, normal.
Q. Did you take his respiration?
A. Yes, 18; that is also normal.
254 Q. What if anything did you discover on his head?
A. I discovered a scar starting from the median line of the head, about the hair line, and extending backward to the left about 4½ inches. The scar was smooth and healthy in appearance and there was no evidence of any bone involved.
Q. Did you make any examination as to his vision?
A. I questioned him as to his vision and made simply a superficial examination of his eyes, and I was unable to discover any abnormal condition.
Q. Did you examine him with reference to his hearing?
A. I did.
Q. What did you find?
A. I didn't find any abnormal condition.

Mr. Kerr: There is no complaint as to his vision, hearing, temperature or pulse. I object to this examination.
Counsel for defendant offered this testimony to show the condition of plaintiff.
Objection overruled, exception by plaintiff.

Q. What, if anything, did you find with reference to the collar bone?
A. I found there had been a fracture of the right collar bone. There was no bony union, there was a fibrous union at this point which permitted the movement of the bone when he would raise his arm and shoulder in that manner (indicating).

Q. Now, state what if anything you found with reference to his fingers.

A. The index and middle fingers of the right hand had been injured. At that time they presented a slightly swollen condition or club shape and the nails had bent down some over the ends of the fingers. The ring finger had been amputated at or near the joint, I think through the bone, what we call the distal bone, the last bone of the finger, the end of the finger. There was a very small portion of the finger nail which he claimed to be a source of irritation and it looked as though it might be sensitive to pressure by manipulating it.

Q. What, if anything, did you find with reference to his left arm?

255 A. I found evidence of a fracture of the left arm at a point 7 inches above the elbow joint. There was some deformity at that point, some enlargement at the seat of the fracture, which seemed to be due to the excess of bony matter thrown out there in the healing of the arm. There was a firm union and, on manipulation of the arm, I could find no limitation of motion; that is, he had about the same motion of the arm in all directions that a man would have whose arm had not been injured.

Q. What if anything did you find with reference to his left thigh?

A. I found evidence of fracture of the left thigh at a point, as nearly as I could measure it, about 8 inches above the knee joint. There was considerable deformity here and the thigh presented a bowed out appearance. There had been an excess of bony callous thrown out which, together with the bone not being quite in line, gave rise to the deformity, but there was also firm union at this point. I was unable to detect any motion, it seemed to be perfectly solid but held in that deformed position.

Q. Did you measure his left leg?

A. I did and it measured 1½ in. shorter than the right leg measured at a corresponding point.

Q. I will ask you whether or not you found anything with reference to the knee joint.

A. There was some relaxed condition of the ligaments of the knee joint that permitted undue motion at that point, but it seemed to me that the leg was impaired more by the fracture than it was on account of the condition of the knee joint.

Q. Now, with reference to the right leg, what did you find?

A. On the anterior surface of the right leg 6½ or 7 inches above the ankle joint was a decided bony enlargement. Whether it was due to a fracture of the tibia or main bone of the leg or whether it was due to an injury such as you often meet with in animals that have been struck on a bone,—I don't believe it could be determined except by an ex-ray examination.

256 Q. Now, Doctor, I will ask you to state what, in your opinion, would be the extent of his injuries with reference to being able to work, whether he could do manual labor.

A. That depends very largely upon the improvement in his con-

dition after the time that I saw him. I doubt very much whether he would ever be able to do hard manual labor. In fact, I don't think he ever would be able to do that, but I believe that, as time passes and his condition improves, it is possible that he may be able to do very light work.

Q. State whether or not, in your opinion, from your examination, you think he will be able, in the future, to walk without crutches. If so, what if anything did you observe that leads you to whatever opinion you may have on that subject?

A. Well, after the examination, I observed him across the street, I walked to my front window. He had an acquaintance with him and when they came to my office they hitched their conveyance over in the church yard, United Presbyterian church yard, just across from my office. After they left my office, I observed him walk over to the conveyance, and it didn't seem to me that he was quite so dependent upon his crutches as he was when he was in the office. He walked to the rear of the conveyance, took his crutches out from under his arms and poked them under the seat, then walked around to the side of the buggy and got in without any assistance. Now, it is not at all an uncommon thing for a man who has been injured and has been under the necessity of using crutches for a considerable length of time to believe that he is crippled and always will be and to make no effort at all to see whether he can walk or not, and my purpose was to watch him when his mind was not on his injuries and see what he could do when he wasn't thinking about himself. From that occurrence I got the impression that, perhaps, he could walk better than he thought he could himself. I believe that he will be able to walk without crutches, probably, in time.

257 On examination of his chest I found his heart and lungs normal. I found the abdominal organs normal. I examined the urine and found that it was normal, showing that the kidneys and bladder were in good condition. Judging from his general condition and his age, it would not be unlikely that he would, to a great extent, regain his figure and improve in his ability to walk.

Cross-examination by Mr. Kerr:

Q. You made this examination along in May last year, at the request of the attorneys of the Railroad Company?

A. Yes.

Q. Did I make an arrangement with you to take the boy there, did I talk to you about it?

A. I don't think you did.

Q. At any rate, the boy came there voluntarily and submitted himself to an examination by you as the doctor of the Railroad Company?

A. Well, representing the Railroad Company.

Q. You are not their regular surgeon?

A. No, sir.

Q. But you were employed to make this examination?

A. I was, yes, sir.

Q. Do you know what you made it for?

A. I made it for the purpose of submitting a report to the attorneys so that they would know the condition of the man at that time.

Q. You made an examination because they were trying to settle and wanted an examination as a ground for it?

A. Yes, sir.

Objection; sustained; exception by plaintiff.

The court instructed the jury not to consider the answer.

Q. You were not this young man's doctor?

A. No, sir.

Q. He never employed you?

A. No, sir.

Q. I will ask you again whether you did not know that it was for the purpose of giving them light, with a view to an arrangement of this case, that you were permitted to examine him?

Objection; sustained; exception by plaintiff.

Q. That was some time in May, 1913?

A. Yes, sir.

Q. Did you ever examine him after that?

A. No, sir.

Q. Did you ever examine him before that?

258 A. Well, only the time that he was first injured and was in the hospital. I had a patient in the same room. Dr. McCullough was there dressing his injuries and called my attention to the diversity of them. I made no examination of them.

Q. It was an unusual case, from the number of fractures and injuries the boy had?

A. Yes, it was.

Q. Didn't you assist the doctor in fixing the boy up some, in putting him in shape at first?

A. I may have, I don't remember.

Q. Weren't you called in to fix up these fractures and you and Dr. McCullough did it together?

A. My recollection is that I saw him under the circumstances I have related. However, I may be mistaken about that.

Q. You haven't any recollection either way?

A. I have a recollection of seeing him in the hospital.

Q. You don't recollect that you were called in by Dr. McCullough, that he called you to help fix him up when he first went there?

A. Well, now, possibly he did, I won't dispute that.

Q. You don't remember about that?

A. No, sir.

Q. Now, you know from your examination that this boy will never be able to do any hard work, any heavy work?

A. I don't think he will.

Q. Even though he ever got so he could walk, this injury in his shoulder would prevent his ever doing any heavy work with that arm?

A. I wouldn't regard that as disabling as his other injuries.
Q. I am coming to the others. A man with his collar bone broken has the pride (?) taken out of him?
A. It is wonderful what a man can do with a broken collar bone.
Q. He can do better than he can without it broken?
A. No, not better, but it is wonderful what he can do. I don't consider that near as disabling as his other injuries.
Q. I don't either but I want to see how many places he has that disables him altogether. This collar bone is a brace to the action of the shoulder and arm?
A. To some extent it is.
259 Q. And if that is broken off, he can't use his arm at all?
A. O, yes, he can.
Q. Will the bones grate together?
A. They won't grate if there is a union.
Q. There is a sort of fibrous union that makes a false joint?
A. That's a whole lot better than no union at all. It is a whole lot better than he was immediately after the injury, as far as being able to use his arm.
Q. He never will be able to do hard work like an ordinary laborer?
A. I wouldn't dispute that.
Q. His leg will never get well enough to do hard work, if he is well enough otherwise?
A. I don't think the man will ever be able to do real hard work. I said that. I don't know how much he can do.
Q. You say that it is possible that he will do light work,—when?
A. After the muscles regain their former tone and strength, as they very likely will.
Q. When?
A. Well, I can't tell you the exact date. If he is 20 years of age, he surely will improve.
Q. Aren't some of these ligaments torn loose and gone altogether?
A. O, no, not altogether, they are still there.
Q. Well, they are torn loose so that they don't operate?
A. Well, I don't suppose they can control the parts as they originally did but they do to some extent.
Q. If they were going to get well, wouldn't they get well in two years?
A. No, sir, not at his age.
Q. He is just at the time to get well, if he ever does?
A. He wasn't fully developed when he got hurt.
Q. You say it is just possible that he will be able to do light work?
A. I can't give you any definite time in which he is going to regain, to the fullest degree, his health, but if he was a man 45 or 50 years of age, I wouldn't have any such expectation as that.
260 Q. You say it is possible that, sometime in the future, he may be able to do light work?
A. Yes, sir.
Q. That is as strong as you will put it?
A. Yes, sir.

261 Dr. A. H. McCULLOUGH was introduced as a witness on behalf of the defendant and, being first duly sworn, was examined by Mr. McBride and testified as follows:—

Q. State your name to the court and jury.
A. A. H. McCullough.
Q. You are a physician?
A. Yes, sir, and surgeon.
Q. How many years' experience?
A. 39.
Q. Where?
A. Mansfield.
Q. What institution or medical college are you a graduate of?
A. Jefferson, Philadelphia.
Q. State whether or not you are the surgeon of the Erie Railroad Co.
A. I am.
Q. And you were on the 5th of January, 1912?
A. Yes, sir.
Q. Doctor, when did you first get acquainted, if at all, with Mr. Marietta, the gentleman that sits there at the end of the table?
A. On the 5th of January, 1912.
Q. Had you met him before that time?
A. Not that I know of.
Q. Where did you first see him?
A. At the Emergency Hospital.
Q. Where?
A. Mansfield.
Q. Do you know how he was brought there?
A. I don't know, in the ambulance, I think.
Q. Was he in the hospital when you reached there or did you reach there first?
A. I think he was in the hospital when I got there.
Q. Did you render him any assistance there?
A. Yes.
Q. Anybody assist you?
A. Dr. Loughridge.
Q. How did Dr. Loughridge happen to be there, do you know?
A. I called him.
Q. Now, I wish you would go on in your own way and describe to the jury what you found and what you did.
A. Marietta had severe injuries, commencing with the cut in his head between 5 and 6 inches long, a fractured collar bone
262 on the right side, the left arm broken about the middle third, the left leg broken at the middle third, the right hip bruised badly, the periosteum injured on the right tibia.
Q. What do you mean by periosteum?
A. The covering of the bone.
Q. What do you mean by tibia?
A. The large bone of the leg.
Q. Go on.

A. The first three fingers on the right hand were injured. The tip of one finger, I think the ring finger, was taken off and the others dressed. I think that was the extent of the injuries, if I remember correctly.

Q. Now, how long did you continue to treat him?

A. He was in the hospital for—well, I don't remember without calling up the hospital and getting the records—it must have been 6 or 8 weeks.

Q. Then where was he taken?

A. He was taken to his home out where some relative lived out northeast of town.

Q. Do you know the relative's name, was it Hecht?

A. Hecht.

Q. Now, did you treat him while he was there?

A. I saw him once there, I think it was in June, 1912. That was the last I saw him.

Q. Have you seen him since that time?

A. Only just passing him on the street.

Q. Have you made any examination of him since that?

A. No.

Q. Have you seen him sufficiently recently to determine whether the injuries he received were permanent or not?

A. No, I think not. I called him up and tried to get into communication with him and asked for an examination, but he refused.

Q. When was that?

A. The first week in April, I think, this year.

Q. Have you noticed him walking or have you stopped to talk to him as you noticed him walk?

A. No, I have not seen him on the street walking at all.

Q. When you last saw him, what was the condition of his injuries?

A. The head was nicely healed, there was a fibrous union
263 of the collar bone, leaving a little motion in it, but a pretty firm union at that time; the left arm, a good union with an excess of callous; the left leg the same, a good union with an excess of callous; a little thickening of the shin bone, to use a common term, on the left leg where the periosteum was injured.

Q. From what you saw of him at that time your knowledge of the condition of his injuries at that time, assuming that he was then 19 years of age, what do you say the probabilities were of *of* his regaining his health, permanent health?

A. He ought to get good use of himself, from the repair he had then and what we would naturally expect from that on,—that he would, in time, get very good use of his limbs.

Cross-examination by Mr. Kerr:

Q. Good use of himself now, what do you mean, Doctor? Able to walk around like other people?

A. Yes, sir.

Q. You think so?
A. Yes.
Q. Although you haven't seen this boy for two years?
A. I say that was my supposition at that time.
Q. If he has not walked and not been able to walk in all that time, your supposition was probably wrong?
A. It might be.
Q. Did you ever have any talk with this boy about examining him?
A. No.
Q. Whom did you have a conversation with on that subject?
A. I don't know, it was over the phone, someone where he lived.
Q. Not with this boy?
A. No, sir.
Q. Didn't you have a talk with him, trying to get this boy into your office, and you a surgeon of the defendant, and when he wouldn't come in, you telephoned to me and I told you you couldn't examine him?
A. I didn't recognize who it was telephoning.
Q. I told you he had had enough examinations?
A. Yes.
Q. And that no other doctor would examine him unless he got an order of court, or something of that kind?
A. Yes, sir.

264 Q. You don't expect this boy ever to do any manual labor, with his collar bone broken and never had a bony union, just a fibrous covering over it, and going around on crutches, you wouldn't expect him to do manual labor, would you, Doctor?
A. Well, if he has not made any improvement for two years, it looks as though there was something holding him back.

265 C. B. MOCHER was introduced as a witness on behalf of the defendant and, being first duly sworn, was examined by Judge Wolfe and testified as follows:—

Q. State your name to the court and jury.
A. C. B. Mocher.
Q. Where do you live?
A. Marion.
Q. How long have you resided in Marion?
A. About a year and a half.
Q. What is your employment or business?
A. Chief train dispatcher.
Q. For what Company?
A. The Erie Railroad Company.
Q. What do you mean by chief train dispatcher?
A. The chief train dispatcher has general supervision of the movement of cars, issues orders for trains, meeting trains and passing trains, and keeps a record of those trains.
Q. Were you train dispatcher or employed by the Company in January, 1912?

A. I was, yes sir.

—. ——.

A. I was what was called a trick (?) dispatcher.

Q. State whether your company keeps a record of the arrival and departure of trains at the various stations along the road.

A. Yes, sir.

Q. How is that done?

A. It is kept on what is called a train sheet, showing the time that all trains start from the terminal and at each station.

Q. What is a terminal?

A. Kent and Galion at that time.

Q. Have you the time of the arrival and departure of train No. 14 on the morning of the 5th of January?

A. Yes.

Q. Where did that train run from and to?

A. It ran, as our train sheet shows, from Galion to Kent.

Q. What was it known as?

A. No. 14.

Q. Was there any special line of service that it performed?

A. Yes, the handling of the goods of the Wells-Fargo Express Co.

Q. What kind of a looking train was it, how was it made up, what kind of coaches and cars?

A. Package and express cars and what we call a combination.

266 Q. What kind of a load did it carry?

A. About from 7 to 10 cars.

Q. On the 5th of January, 1912, what direction did it run?

A. It ran in an eastward direction, eastward train.

Q. This No. 14 always runs east?

A. Yes, sir.

Q. Is there any rule as to odd and even numbers?

A. Yes, the even numbers always run east and the odd numbers west.

Q. I open up to you a paper here and ask you what it is.

A. That is what is called a train sheet, telegraphic register of trains.

Q. What day or dates does the sheet that I am unfolding here disclose?

Q. This is for trains that pass between Galion and Creston on January 4th, 1912.

Q. Is this a time table?

A. No, sir, it is not a time table, it is the time that trains actually passed each open telegraph box.

Q. Now, can you tell by that sheet the time of the arroval and departure of freight trains that went west on the morning and day of the 5th?

A. Yes, sir.

Q. What does this refer to?

A. This refers to all trains that left Kent or Galion after mid-

night on January 4th up till midnight of the next day, the 5th,—all appear on this sheet.

Q. Then would it or would it not include trains which traveled on the morning of the 5th?

A. Yes, sir, trains that left Kent.

Q. Is that sheet accurate or otherwise?

A. Accurate.

Q. From that sheet will you show us the time of freight trains as they pass, from Ashland, for instance, westward on the line of the Erie road towards Mansfield and to Mansfield?

A. Here is train N. C. 2005 running as extra, arrived at Ashland 2:47, departed 3:33 in the afternoon; extra 1737, arrived at Ashland 3:53, departed at 4:03 A. M., passed Milton 4:37 A. M., G. A. tower 4:45; arrived at Summit 6:31 A. M., departed at 6:39 A. M.; passed the west end of Mansfield at 8:07; passed Condon at 8:18 A. M.

Q. Where is Milton?

A. About 4 miles west of the town of Ashland.

267 Q. What is the next station or place going westward from Milton?

A. G. A. Tower.

Q. Do you know where that was at that time?

A. About 3 miles west of Milton.

Q. Where is Summit?

A. About 6 miles west of G. A. Tower.

Q. What is the next station on towards Mansfield?

A. That is the last station,—then you come to Mansfield.

Q. What was the number of the train you last mentioned?

A. Extra 1737, that is the number of the engine.

Q. Explain to the jury what is meant by "extra" in train service?

A. An extra train is one that is not shown on the time card and we call them by the number of the engine.

Q. The number shown on the time card is the number regardless of the number of the engine?

A. Yes, sir.

Q. What trains are down on the time card?

A. All passenger trains and all regular freight trains. If is is necessary to run other trains, they call them extra.

Q. Then train 1711 is named after the number of the engine?

A. Yes, sir.

Q. Now, were there two trains pretty close together going west at that time? If so, what were their numbers?

A. 1711 was the next train.

Q. Which one first?

A. 1737.

Q. Now, give us the conduct of No. 1711 from Ashland West through Mansfield.

A. 1711 arrived at Ashland at 4:30, departed at 4:35 A. M., passed Milton at 4:58, G. A. Tower at 5:04, Summit at 7:52 and departed Mansfield at 8:18.

Q. Now, what time did he get to North Siding?
A. We have no telegraph office there, I can't tell.
Q. Now, have you any record that refers to train 1737, any note?
A. Yes, I find here that engine 1737 was "delayed between G. A. Tower and Summit, account no steam."

268 Counsel for plaintiff moved that the answer be stricken out but the court overruled the motion and plaintiff then excepted.

A. "Account no steam. Engine 1711 shoved into Summit."
Q. Now, do you know whether train 1711 went with the engine to Summit?
A. The indications are that it did not.

Counsel for plaintiff moved that the answer be stricken out but the court overruled the motion and plaintiff then excepted.

Q. Who made these figures on this sheet?
A. Dispatcher Ballinger.
Q. Where is Dispatcher Ballinger?
A. At Marion.
Q. What had you to do with making up this sheet?
A. Nothing on this statement.
Q. Now, I want to find train 14 on the 5th of January, which way did that train run?
A. Eastward.
Q. You have already testified, I believe, did you not, where it appears on the scene? Where do you find it?
A. On this sheet.
Q. Where does it commence on this sheet?
A. At Galion shops.
Q. Where does it end?
A. Creston.
Q. Where is Creston?
A. About 40 miles east of Mansfield.
Q. And Ashland is an intervening station?
A. Yes.
Q. Now, can you tell from that sheet what time of day No. 14 left Galion?
A. Yes, left Galion shops, that's the telegraph office about half a mile east of Galion depot, at 5:12 A. M.
Q. What is the distance from there to Mansfield?
A. 15 miles.
Q. What time did it arrive at Mansfield?
A. 5:33.
Q. Is that the first stop from Galion to Mansfield?
A. Yes, sir.
Q. Can you tell what time the train passed through Ontario, the point just west of Mansfield?
A. No, sir, they had no telegraph office at that time.
Q. Is there any telegraph office between Galion and Mansfield?

A. Only Condon.
Q. Can you tell when it passed Condon?
A. Yes, sir, at 5:27.
Q. Where is Condon?
A. 4 miles west of Mansfield. Arrived at Mansfield 5:33
269 and departed 5:44.
Q. What is the next telegraph station east of Mansfield?
A. Summit.
Q. Will you tell when it arrived there and passed?
A. It didn't stop, it passed there 5:51.
Q. What is the next telegraph station?
A. G. A. Tower.
Q. Did it stop there?
A. No, sir, it passed through at 5:59.
Q. And the next station?
A. Milton.
Q. Did it stop there?
A. No, sir, passed there at 6:05 A. M.
Q. Where did it next stop?
A. Ashland.
Q. Did it stop there?
A. No, sir, passed through 6:12.
Q. Where did it next stop going east, as shown by the record?
A. Stopped at Akron.
Q. Now, what time do you say it passed G. A. Tower going east, No. 14?
A. 5:59.
Q. What time did No. 1711 pass G. A. Tower going west?
A. 5:04.
Q. And what time did 1737 pass there?
A. At 4:45.
Q. Now, is there any other train going east that resembles No. 14, about the same time in the morning or was there on Jan. 5", 1912?
A. No, sir.
Q. Is there a passenger train that goes east in the morning, a regular train? If so what time?
A. Train No. 8 on that morning departed from Mansfield at 9:22 A. M.
Q. What time does it first make its appearance on this sheet?
A. Leaving Galion at 8:50.
Q. Do you know its usual time of leaving Galion?
A. No, I couldn't say now, our time card has changed and this was two years ago,—I don't remember.
Q. When was the next train preceding that that left Galion that morning?
A. Train No. 10.
Q. What time did it leave?
A. 1:06 A. M.
Q. What time did they get to Ashland?

A. Arrived at 2:05, departed at 2:08.

270 Q. Was there any other train in the forenoon than No. 8, No. 10 and No. 14?

A. No, sir, that's all there was.

Cross-examination by Mr. Kerr:

Q. You didn't make this train sheet yourself?
A. No, sir.
Q. You haven't any personal knowledge of it?
A. No, sir.
Q. You just found it on there made by somebody else?
A. Yes, sir.

Redirect examination:

Q. When were these sheets made that you refer to?
A. On the date that is on the sheet.
Q. Have you any other source of information as to the time of arrival and departure of trains?
A. Not unless the conductor of the train would have a record.

Dr. A. H. McCULLOUGH was recalled on cross-examination
271 by Mr. Kerr and testified as follows:

Q. Do you remember when you went out to the Hecht farm to set this young man's collar bone?
A. Yes, sir.
Q. Do you remember how long that was after he went out on the farm?
A. I think it was in June.
Q. You had a talk with Mrs. Hecht, the lady sitting over there, about his condition, on the porch of the house?
A. Yes, sir.
Q. Didn't you say to her then that the boy never would be any better than he was then?
A. I don't think I said he would never be any better, I said he would be slow in getting better.
Q. Didn't you say he never would be any better? She asked you how he would likely be in the future and do you swear you didn't say that?
A. I won't swear to that. I might have said it but I don't remember.
Q. You won't say either way?
A. No, sir.
Q. You remember having talked with her?
A. Yes, sir.
Q. Didn't you say just what I have said? Didn't she ask you how this boy would get in the future and didn't you say that he never would be any better than he is now?
A. I have no recollection of saying that.

272 C. B. MOCHER was recalled as a witness on behalf of the defendant, examined by Judge Wolfe and testified as follows:

Q. Is there any other person living that knows about that train sheet?

A. Mr. Ballinger made that at that time. There were three dispatchers working on that train sheet, 8 hours each, and Mr. Ballinger was one of them.

Q. Who were the others?

A. Their names will appear on the sheet,—Mr. Vesper, Mr. Eberhart and Mr. Ballinger.

Q. And Mr. Murphy's name appears on this corner?

A. Yes.

Q. Where is Vesper?

A. At Marion.

Q. Where is Everhart?

A. At Marion.

Q. And where is Murphy?

A. He is at Marion.

Thereupon defendant rested its case.

Plaintiff's Rebuttal.

Mrs. P. W. HECHT was introduced as a witness on behalf of the plaintiff and, being first duly sworn, was examined by Mr. Kerr and testified as follows:

Q. You are the wife of P. W. Hecht, Philip Hecht?

A. Yes, sir.

Q. You live out on the Erie Railroad?

A. Yes, sir.

Q. I will ask you to state whether you were at home at the time Dr. McCullough came out to see Byron here when he had his collar bone broken?

A. Yes, sir.

Q. What time was that, if you remember the time?

273 A. Well, I think it was long the latter part of May or the first of June sometime.

Q. Did he say to you at that time that the boy would never be any better than he was then?

A. Yes, sir.

Cross-examination by Judge Wolfe:

Q. Was that all he said?

A. No, sir, that is not all he said. I can't recollect what all he did say.

Q. You can't remember the rest of it?

A. No, sir.

P. W. HECHT was recalled as a witness on behalf of the plaintiff, examined by Mr. Kerr and testified as follows:

Q. Were you with Byron when he was taken over there to be examined by Dr. Loughridge?
A. Yes, sir.
Q. Were you with him when he went out of the doctor's office over to the wagon to go home?
A. Yes, sir.
Q. Did you see the doctor somewhere while you were going over?
A. I seen him standing at the window.
Q. Now, I will ask you to state whether, when Byron went to the wagon, he stuck his crutches in the wagon and walked around the wagon and got in without his crutches?
A. No, sir.

Cross-examination by Judge Wolfe:

Q. You didn't notice that?
A. What?
Q. The crutches?
A. Yes, sir.
Q. Where was it that the doctor, at that time, was standing at the window?
A. He was standing at the window when we were half way across. I couldn't say whether he stood there all the while.
Q. Then you watched the crutches after that, you didn't watch the Doctor any further?
A. No, sir.
274 Q. Did he use the crutches in getting into the wagon?
A. Yes.
Q. He walked in with them?
A. Yes.
Q. What kind of a rig was it?
A. A spring wagon.
Q. You didn't notice the Doctor any more after that?
A. No, sir.
Q. Did you ever talk this over with anybody?
A. No, sir.
Q. Never mentioned this circumstance from that time on?
A. No, sir.
Q. Just thought it out. You heard what your wife testified to here?
A. No, sir.

BYRON MARIETTA was recalled as a witness in his own behalf, examined by Mr. Kerr and testified as follows:

Q. When did you first see this man Quick over here, this claim agent, and what did he say to you, if anything, about having been there to see you before?
A. He told me he was there just a couple of days after——

Counsel for the defendant objected to the question and moved that the answer be excluded; but the court overruled the objection and motion and defendant then excepted.

Mr. Quick told me that he was in there a day or two after I was hurt and the doctor wouldn't let him in, wouldn't allow him to come in and see me, the condition I was in, at all.

Q. Now, tell the jury whether he offered you anything and what he said upon the subject of any offer, if you would make a statement or talk to him about this case.

To which question defendant objected, the court overruled the objection and defendant then excepted.

A. When he first came in, he asked how I was and how my injuries were and he began to write something there and when he got done he asked me to sign it and I told him no, I wouldn't
275 sign no paper. He said the Erie Railroad Co. would give me a nice deck of cards if I would sign it,—he would send me a deck. I told him I didn't play and it wouldn't be of any use to me. I was reading a book and he asked me if I liked books and I told him yes. He said he would send me a book if I signed the paper and I told him I had all the books I wanted and couldn't get through with those.

Q. Was that the conversation you had at that time?

A. Yes, sir.

Q. Do you remember the time when you went to Dr. Loughridge's office here in Mansfield to let him examine you?

A. Yes, sir.

Q. Who did you come with?

A. My uncle.

Q. I will ask you to state, after you came out of the office and went across the street to the wagon, whether you put your crutches into the wagon and walked around the wagon and got in without them?

A. I did not.

Q. How did you get in?

A. I put the crutches under my left shoulder on the side where my weak leg is, took hold of the spring wagon seat with my hand and got up into the wagon.

Q. How many times did Quick come out to see you when you were out in the country?

A. He came out twice.

Q. Did he have any conversation there about giving you anything, not about settling the case but just in a friendly way?

A. I was laying on the couch, I wasn't able to be up, I couldn't get up myself.

Q. What did he do?

A. He offered me something.

Q. Just tell how he did it.

A. He asked if I would like to smoke and I said "Yes, sir". He handed me some cigars and he came at me like that (indicating),

trying to make me sit up. I couldn't sit up and finally he came over and gave them to me.

Q. How far was he from you?

A. About two feet beyond an arm's length.

276 Cross-examination:

Q. Marietta, who went with you to Dr. Loughridge's office?

A. My uncle.

Q. Anybody else?

A. No, sir.

Q. Where did you live then with your uncle?

A. At my uncle's place out northeast of town.

Q. And that was where you boarded when you got hurt?

A. Yes, sir, the same place.

Q. How far is it from there down to Mansfield?

A. 5 miles.

Q. How did you come to town?

A. In the spring wagon.

Q. One seat or two seats?

A. One seat.

Q. You sat with your uncle in the spring wagon?

A. Yes.

Q. You got out of the spring wagon and went into the doctor's?

A. Yes, sir.

Q. Then you came out of the doctor's office and got into the spring wagon?

A. Yes, sir.

Q. Did you go any place else in Mansfield than to see Dr. Loughridge?

A. I didn't go any place out of the spring wagon. I sat in the spring wagon while he went several places. He stopped down to his brother's grocery, then went over to Lantz's mill and stopped there, and then we went home.

277 Q. Who lives out there at Hecht's beside you and your uncle and aunt?

A. They have children there.

Q. Anybody else?

A. No, sir.

Q. How old is the oldest child?

A. That's more than I can say, how old he is.

Q. Young lady or boy?

A. Young man.

Q. Any girl, too?

A. Yes, sir.

Q. They are cousins of yours?

A. Yes, sir.

Q. Did you sign this paper then?

A. No, sir.

Thereupon both sides rested and that is all the evidence there was offered by either party on the trial of this cause.

At the close of all the evidence, defendant renewed the motion to take the case from the jury and direct a verdict for the defendant; but the court overruled the motion and defendant then excepted.

278 *Charge to the Jury.*

GENTLEMEN OF THE JURY: This action was originally brought by P. W. Hecht as the next friend of Byron Marrietta, then a minor, against the defendant, the Erie Railroad Company, to recover damages for injuries which he claims were caused by the negligence of the defendant. The plaintiff asks for a verdict at your hands in the sum of Thirty-Five Thousand Dollars ($35,000).

Since the filing of the petition the plaintiff has arrived at his majority and the action, therefore, proceeds in his own name.

I will not read the pleadings to you. You will have them with you when you retire to your jury room and you may read them to refresh your recollection as to any claims the respective parties make by the allegations contained therein. But the statements contained in the pleadings, although sworn to, are not to be considered as evidence. The merits of the controversy are to be determined from a consideration of the evidence adduced during the trial, as applied to the instructions of the court. As I proceed in this charge, I will point out and refer to such portions of the pleadings and the issues raised thereby as will present the questions which you are to try and determine in this lawsuit.

The province of the petition of a plaintiff, in any case, is to set forth the facts which he claims will constitute his cause of action; that of the answer to set forth the defense claimed to such cause of action by the defendant; and that of the reply, a defense to any affirmative matter set forth in the answer.

Now, the plaintiff contends, in substance, by his petition, that, on the 5th day of January, 1912, and for some weeks prior thereto,
279 he was in the employ of the defendant as a section man and, under such employment, it was his duty to work on the track of defendant whenever directed by the foreman, and on a certain section of said railroad extending westward from what is known as Pavonia in this county. Plaintiff avers that his said foreman, the day before, or at such times as it was convenient to do so, would direct the men, including plaintiff, where to work the next day, and at what place on such section they were to come to work or to be carried to the place where work was to be done on the track;

That just prior to the time plaintiff received the injuries complained of he was directed by said foreman to come from the place he boarded to a point about one fourth of a mile east or north of a tower located on said action upon which he was employed as aforesaid; that, in obedience to said direction of said foreman, he walked to defendant's track on said 5th day of January, 1912, and started east on the track to go to the place directed to engage in said work;

Plaintiff avers that, at the place he received his injuries and for a long distance north and south the defendant's road is a double track, that the north track is used for trains going west and the south track for trains going east; that just before he started east on the track to go to the place he was to work, a west bound freight train passed on the north track and he walked east on the east bound track, and when he walked a short distance, an east bound passenger train came doen the track on which he was walking and to get out of the way, he stepped over onto the west bound track and was struck and run over by an engine in charge of an engineer, and which engine was running backward and in an opposite direction from the direction trains run upon such track;

That said engine was running in the same direction as the passenger train on the east bound track, parallel to track upon which said passenger train was running and, as near as plaintiff
280 knows, he avers said light engine was running alongside of said passenger train or so near its rear that plaintiff was struck before he had time to step off the track. He avers that his vision was obscured by the steam and smoke of the passenger train so that he did not and could not see in the direction of said light engine and could not hear the approach of said engine for the noise.

He avers that said engine approached the point where he was struck at a high rate of speed, to-wit, about 40 miles per hour, running alongside of the passenger train or its rear end, obscured from vision by the smoke and steam of the train, and without any signal by bell or whistle to give notice that it was running parallel with the passenger train in a direction opposite to the direction of trains on such track.

He avers that the engineer and other employes on the engine knew that the men employed on the section, including the plaintiff, would at this time be going to their work on and over the tracks of defendant, and knew that plaintiff was on the track, and knew that running an engine in the direction it was going alongside a rapidly moving passenger train going in the same direction on the opposite track, without any signal by bell or whistle, would endanger the lives and limbs of section men, and that it was negligence of agents and servants to do so under the circumstances alleged; that the plaintiff at the time exercised due diligence for his own safety by looking and listening for a train and engine, and that he was without fault;

That the defendant was negligent in not providing rules and regulations requiring notice or signal in such case and not instructing plaintiff as to the danger of this situation, and he avers that the injuries he sustained resulted directly from the negligent acts of defendants, as aforesaid.

281 The defendant, by its answer, denies each and every allegation of negligence contained in the petition of plaintiff; denies that it owed to the plaintiff any duty under the circumstances, or that it is legally liable in any way for the injuries sustained by

plaintiff, and denies all liability for any damages resulting from his injuries sustained in said accident.

It also charges that the plaintiff was guilty of negligence directly contributing to his injury. Also, a third defense is set forth in the answer, both of which will be referred to later on.

Under the general denial of defendant, the burden is cast upon the plaintiff to establish by a preponderance of the evidence, that is, by evidence that is more convincing, that weighs more in your minds as against all other evidence to the contrary, the three following propositions:

1st. That the defendant, immediately prior to and at the time of the alleged injury to him, owed the plaintiff some legal duty in the particulars charged in the petition;

2nd. That the defendant, by want of ordinary care on its part, failed or omitted to discharge such duty to the plaintiff in some one or more of the particulars charged in the petition.

3rd. That such failure or omission, if any, on its part, was the direct and proximate cause of the injuries to plaintiff.

If the plaintiff has established these three propositions by a preponderance of the evidence, then the plaintiff is entitled to a verdict at your hands, unless immediately prior to and at the time he received his injuries, he was guilty of negligence directly contributing thereto.

If the plaintiff has failed to establish said three propositions by a preponderance of the evidence, that will end your deliberations and you will return a verdict for defendant.

Upon the issue raised by the second defense of the answer
282 and the reply of plaintiff, the burden is upon the defendant to establish the claim it makes in that respect, by a preponderance of the evidence, unless the evidence of the plaintiff raises the presumption that he was guilty of negligence directly contributing to his injury. If you find that plaintiff was guilty of negligence directly contributing to his injury, then he cannot recover, and if you so find, you will return a general verdict for defendant.

Now, gentlemen, to every charge of negligence specified in plaintiff's petition or inference of negligence, if any, from the facts pleaded is denied by the answer of defendant, as well as any charge contained in the petition that the defendant, under the circumstances, owed to the plaintiff any legal duty in the premises.

Therefore, as I have already said, the burden is upon the plaintiff to show by a preponderance of the evidence that the defendant owed to plaintiff some legal duty, under the circumstances, and further, that the defendant negligently failed to discharge such duty, if any, in some one or more of the particulars charged in the petition, and that such negligence, if any, was the direct and proximate cause of injuries to plaintiff, before he is entitled to recover.

The mere happening of an accident is not sufficient to base a claim for damages resulting from injuries received in the accident, nor is negligence ever presumed from the mere happening of an accident. Its existence, if it exists in any given case, must be shown

by a preponderance of the evidence, and the burden is upon him who asserts it to make such showing.

Negligence, in a legal sense, consists of some act done or the omission of some duty imposed which, in the natural and ordinary course of events, might cause injury to another; but the omission of a duty is not the foundation for an action unless it
283 results in injury to one for whose protection the duty is imposed. So, in this case, your first injury will be whether, under the facts and circumstances of the case, a duty was imposed upon the defendant for the protection of the plaintiff. If you find by a preponderance of the evidence, as applied to the instructions given you by the court that such duty was imposed upon the defendant immediately prior to and at the time of the accident, then, under the law, the defendant would be required, in the performance of such duty, to exercise ordinary care, that is, such care as an ordinarily prudent person would exercise under the same or similar circumstances, to avoid possible injury to plaintiff.

If the plaintiff, at the time he was run over by the engine of the defendant, was upon the track of the defendant as a mere trespasser, that is, without legal right, then the defendant would owe him no legal duty; or, if he was there as a bare licensee, that is, permission, but without any contractual relations or requirement on his part to attend to or reach the place of performance of the master's business, under some employment by it, at the time and place of his injury, the defendant would owe him no duty and plaintiff could not recover. But if the plaintiff, at the time he was injured, was actually employed and then engaged in the service of defendant, within the scope of his employment, or if, at the time he received his injuries, the plaintiff was on defendant's tracks by the express direction and authority of said foreman, in good faith, to enter and reach the place designated by the foreman in his employment, or that, in taking the course that he did take and upon the track of the defendant, it was a course that was reasonably necessary for one to take, situated as he was situated with reference to the place where he resided, and at the time he was in good faith on the way to enter his master's business, then, in either of said events, the law would enjoin upon
284 defendant the duty to exercise reasonable care and diligence to avoid injury to him.

If you find from the evidence, under the instructions given, that the defendant, under the circumstances, did owe a legal duty to the plaintiff, then you will further inquire whether, under the circumstances, as may be shown from a consideration of all the evidence, the defendant was guilty of any act or acts of negligence specified in the petition, in the operation of the light engine by its servants in charge thereof, that directly resulted in injury to plaintiff.

It is charged in the petition that the north track of said double track is the westbound track; that the south track is the east bound track; that the servants of defendant in charge of the engine that ran over plaintiff knew prior to the accident that the plaintiff and other employes of defendant used the tracks as a way or path in going to or from their work; that on the morning of the injury

to plaintiff, he was making such use of the track while on his way to work; that the servants of defendant in charge of said engine went in a westerly direction, assisting or pushing a freight train of defendant up a grade on the west bound track, just prior to the time plaintiff entered upon the east bound track, that soon after the time he had so gone upon the east bound track, another train came from the west on the east bound track and he stepped off the east bound track on to the west bound track to avoid danger; that soon after he stepped on the west bound track, the light engine backed down without giving any signal or alarm of its approach and, at a very high rate of speed, ran over the plaintiff.

Plaintiff contends that, at the time said engine backed down, it was running, just prior to the time he was struck with it, parallel and alongside with a swiftly moving train on the east bound track, which other train, as contended by plaintiff, was making noise and
285 throwing out steam and smoke to obscure the vision.

It may be said that the defendant, in the operation of its trains, and carrying on its business, would have the right to adapt its tracks and employ their use in the operation of its trains in such manner and at such times as would reasonably answer its purposes in transacting its business, and might change the course and direction of its trains and engines without notice, provided such change would not necessarily endanger the lives or limbs of other employes to whom it owed a duty to exercise ordinary care; and whether a change in the customary or recognized use of a track as for one direction to that of another direction would be justifiable or not warranted in a given case depends upon the circumstances at the time and the rights of parties that might be affected by such change or other use.

If you find by a preponderance of the evidence that, at the time the engineer of the light engine assisted the freight train westward up the grade on the west bound track, said engineer knew that the tracks of defendant were used at or about such time and place by the men who were employed upon said section as a way to their place of work or, under the circumstances, could have reasonably apprehended that the section men made such use thereof for such purpose, and you further find that the plaintiff made such use by the direction of the foreman, or that it was reasonably necessary, taking into consideration the location of his residence and time and character of his employment, and you further find that the engineer of said engine backed said engine down on said west bound track in an easterly direction, without giving any notice, signal or alarm as would operate, under the circumstances, to give reasonable and timely notice of danger to one who was in the exercise of
286 ordinary care, and you further find that the plaintiff was run oved by said engine, and that immediately prior to and at the time of the accident, he was in the exercise of ordinary care for his own safety, then defendant would be liable.

If you find that the engine in question was backing eastward on the west bound track at a high rate of speed, that fact, standing by itself, would not fasten negligence on the defendant, nor the mere fact that the engine in question might have been running parallel,

immediately prior to the accident, with a train on the eastbound track, and the smoke and steam from such other train may or may not have hid the engine from view,—standing by themselves be sufficient to charge the defendant with negligence; but all of such circumstances, as you may find them, may be taken into consideration with all the circumstances of the case, as disclosed by the evidence and applying the same to the instructions given by the court, determine whether or not the defendant should be held guilty of negligence in the particulars charged.

The next item is that raised by the second defense of the answer wherein defendant alleges that the injuries, if any plaintiff received, were caused by his own fault in the particulars set forth in the answer which directly contributed to his own injury.

The charge of negligence against the plaintiff is denied by the reply of plaintiffs and the burden, as I have already said, is upon the defendant to establish the claim it makes in that respect by a preponderance of the evidence, unless the evidence of plaintiff raises the presumption of negligence on his part. It is the law, and you are so instructed, that one who is guilty of negligence directly contributing to his injury cannot recover although the other party who is sought to be charged as responsible for such injury is
287 also guilty of negligence which, in some measure, contributed in producing the injury. The law does not undertake to nicely determine who is the more guilty of negligence. If the accident was caused by the mutual or combined negligence of both plaintiff and defendant, then plaintiff cannot recover.

The railroad track being a place of danger, the plaintiff would be required to recognize such danger and to use his faculties of sight and hearing to void possible danger that might arise from the movement of trains upon the track. Before the plaintiff entered upon the west bound track and brought himself within the zone of possible danger from an engine or train running upon said track, it would be his duty to look and listen. If he failed to do so and his injuries resulted, in whole or in part, by reason of such failure, he would not be in the exercise of ordinary care. If, before reaching the zone of danger of the west bound track, the plaintiff looked in both directions and listened, and by reason of obstructions of smoke and steam from an engine and train approaching on the parallel track, his looking was unavailing and he could not see to the westward, and by reason of the noise of the approach of said train on the eastbound track, he was unable to hear and did not see or hear the engine on the north track, and no other fact or circumstance appeared which would cause an ordinarily prudent person, under the same or similar circumstances, to refrain from entering upon said north track, at said time, to protect himself from possible injury, then, under such circumstances, plaintiff would not be chargeable with negligence.

If you find that the defendant was guilty of negligence in the particulars charged and that the plaintiff was not guilty of negligence contributong to his own injury, then you will proceed to assess such damages as will compensate him for injuries sustained. In de-

termining the amount, if any, you may take into consideration his
condition of health immediately prior to and at the time of
288 the accident, to what extent, if at all, his health has been
impaired by reason of his injury, to what extent his earning capacity has been impaired, if at all, by reason of said injuries; you will take into consideration the nature and extent of the injuries, as may have been shown by the evidence, whether or not they are temporary or permanent in their character; you may also take into consideration the pain and suffering endured, if any; you may take all such matters into consideration in determining the amount of damages, if any, the plaintiff is entitled to recover.

You are the sole judges of the weight of the testimony and the credibility of the witnesses. The law of the case you will take from the court as given in these instructions.

If you find for plaintiff, you will find in one gross sum. If you find for the defendant, you will simply say by your verdict "We find for defendant."

When you retire, choose one of your number foreman and when you agree upon a verdict, have it signed by your foreman and return it into court.

As to the third defense contained in the answer, in which the defendant claims that plaintiff cannot maintain this action because the defendant is engaged in interstate commerce, you will not consider that defense.

289 Counsel for plaintiff excepted to the charge generally and to each and every portion thereof.

Counsel for defendant excepted to each and every portion of the charge each of the following requests:

Also, to the fact that the court repeated the allegation of the petition that plaintiff was especially directed, the night before the accident, by the foreman, to go to a certain place along the track, whereas the testimony of the plaintiff did not sustain that allegation.

Counsel for defendant also excepted to the refusal of the court to charge each of the following requests:

Counsel for defendant requested the court to charge the jury as follows:

I.

"If the plaintiff, for his own convenience, voluntarily went along the tracks of the railroad and this railroad was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks."

But the court refused so to charge the jury and defendant then excepted.

Counsel for defendant also requested the court to charge the jury as follows:

II.

"If the plaintiff, in getting off the track upon which he saw a train aproaching, could with safety and reasonable convenience, have

stepped to the right or south of such track, and of his own choice stepped on to a parallel track and was struck by a train on such parallel track, he assumed the risk of such choice."

290 But the court refused so to charge the jury and defendant then excepted.

Counsel for defendant also requested the court to charge the jury as follows:

III.

"If the plaintiff was intending to go to a point on the railroad called Old Summit tower, to go to work at 7 o'clock central standard time, and was struck and injured at or within a few minutes of 6 o'clock of said standard time, then the Company owed him no duty."

But the court refused so to charge the jury and defendant then excepted.

Counsel for defendant also requested the court to charge the jury as follows:

IV.

"If the engineer operating the engine which struck and injured the plaintiff had no knowledge and no reason to anticipate, by reason of the time of day, that persons would be upon the track, he was not negligent in failing to give signals or take precaution to prevent possible injury to one he had no reason to expect."

But the court refused so to charge the jury and defendant then excepted.

291 Counsel for defendant also requested the court to charge the jury as follows:

V.

"If plaintiff, when he stepped from the east bound track to or on to the west bound track, by reason of smoke, could not see whether or not it was safe so to do, or remained there under such conditions until injured, then he was negligent."

But the court refused so to charge the jury and defendant then excepted.

Counsel for defendant also requested the court to charge the jury as follows:

VI.

"It is not claimed that plaintiff at and just prior to his injury was in actual employ of the company, or under or subject to its immediate direction, and whatever he did was his own act, and if he saw fit to take chances, he assumed the hazard."

But the Court refused so to charge the jury and defendant then excepted.

Counsel for defendant also requested the court to charge the jury as follows:

"Information of knowledge on the part of section foreman that some section men went to their place of work along the tracks of the railroad does not impute knowledge to the engineer operating the engine, and the only negligence charged in the petition is that of the engineer, and this information on the part of the section foreman must not be considered by the jury in determining the issue submitted to you."

But the court refused so to charge the jury and defendant then excepted.

292 The jury having found in favor of the plaintiff, the defendant, within three days, made a motion for a new trial hereof, which motion the court overruled and rendered judgment on the verdict; to which ruling of the court the defendant at the time excepted and was granted the statutory time in which to prepare, file, and have allowed its bill of exceptions.

This day came the defendant, by its attorneys, and presented this, its bill of exceptions taken on the trial of this cause, and it appearing to the court that the same was duly filed, and that the time has not elapsed for presentation to or allowance by the court, said bill of exceptions, being found by the court to be true, is allowed, signed, sealed and, on motion, is hereby made a part of the record in this cause, but not spread at large upon the journal of this court, as of this term, this 3rd day of October, 1914.

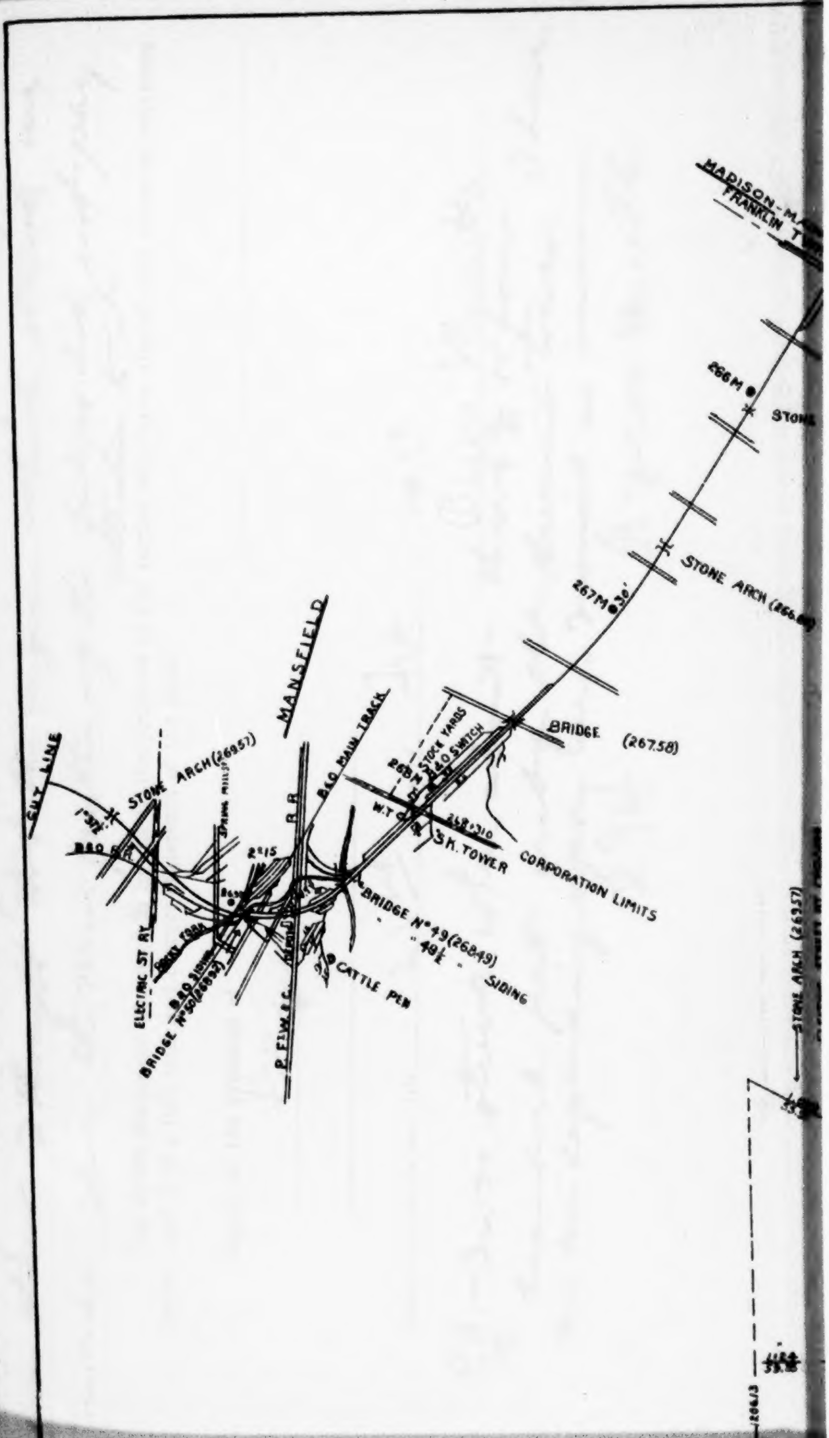
EDWIN MANSFIELD, *Judge.*

MINNIE E. McCRAY,
Official Stenographer.

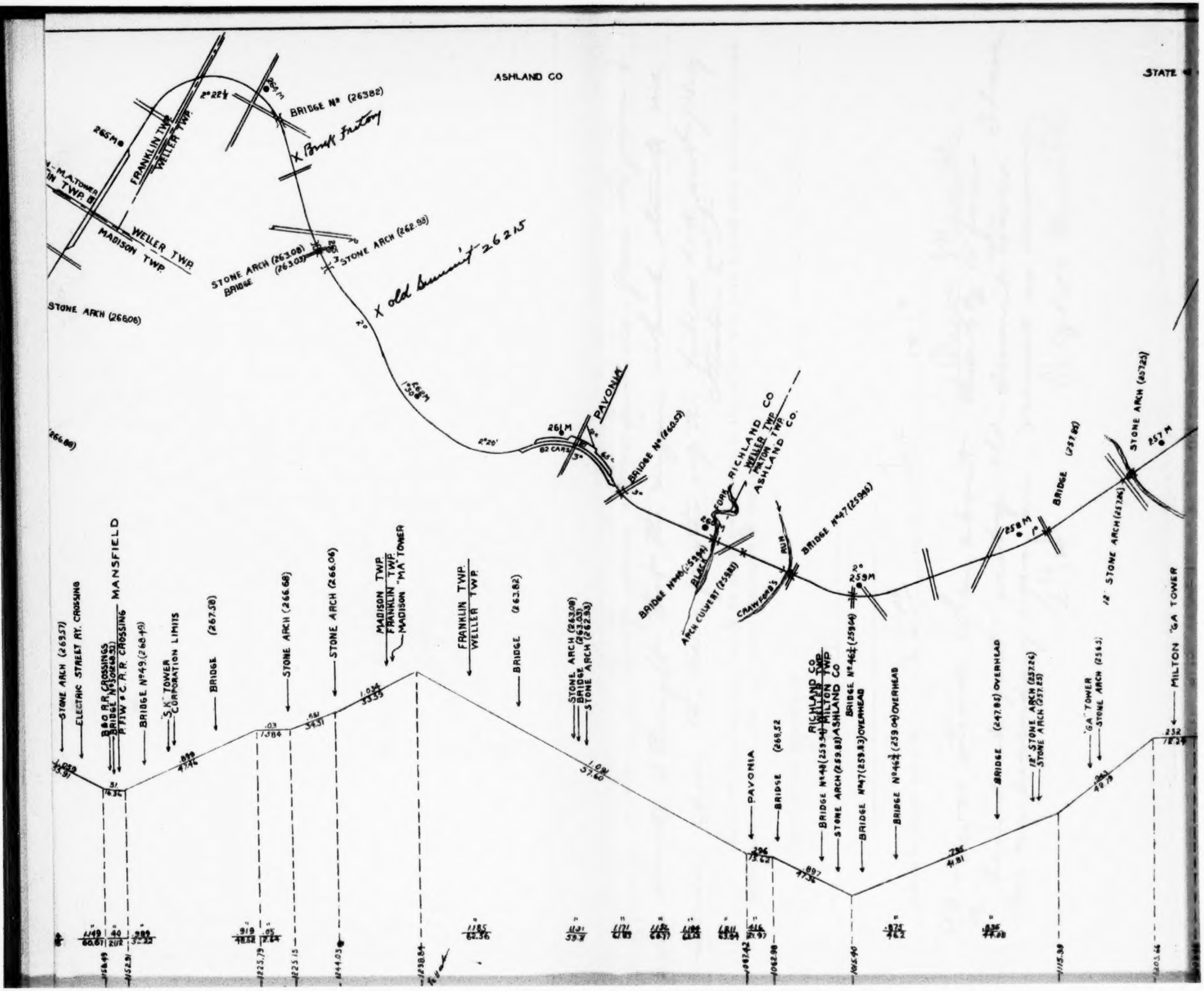
Filed Mar. 25, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

[Endorsed:] 14846. Filed Mar. 25, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

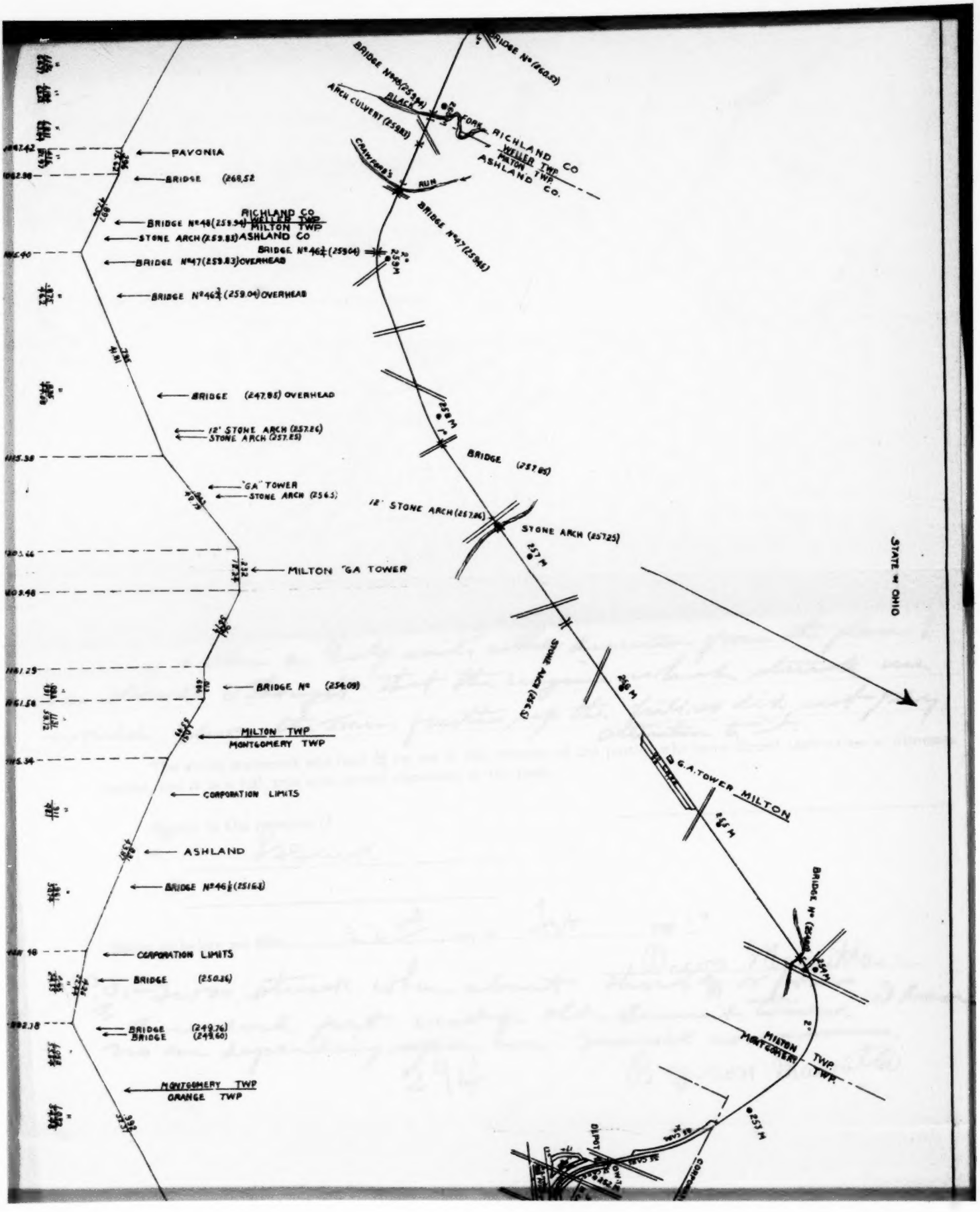
(Here follow maps marked pages 293 and 295, also Def't's Ex. A, marked page 294.)

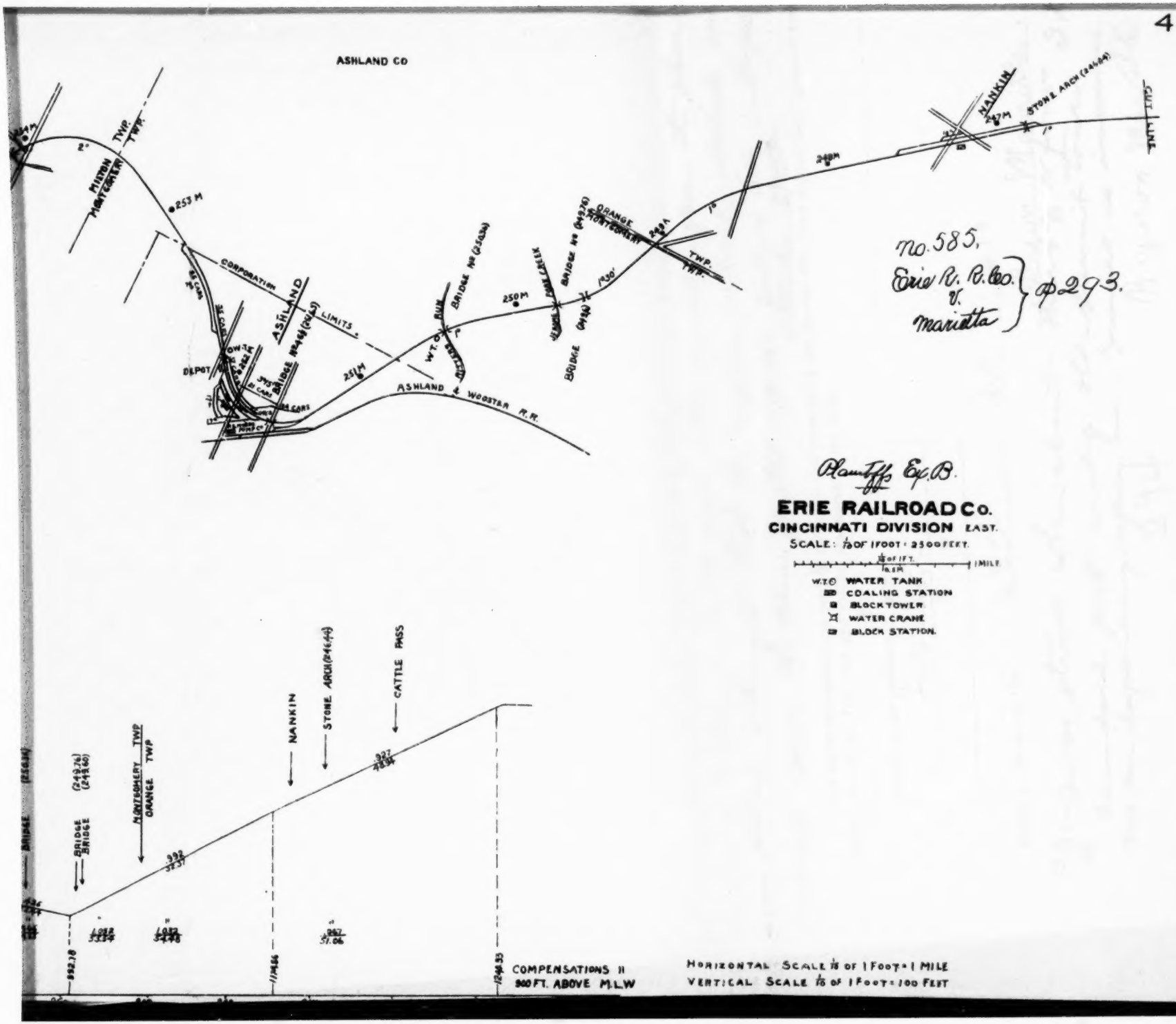


MANSFIELD
CUT LINE
STONE ARCH (269.57)
B&O MAIN TRACK
B.R.
STOCK YARDS
BRIDGE (267.58)
STONE ARCH
267M
266M
268M
W.T.
CORPORATION LIMITS
SK. TOWER
BRIDGE No 49 (268.49)
SIDING
CATTLE PEN
ELECTRIC ST RY
BRIDGE
P.FtW.&C.
STONE ARCH (269.57)



ASHLAND CO
BRIDGE Nº (26382)
X Brick Factory
FRANKLIN TWP.
WELLER TWP.
265M
M.A. TOWER
MADISON TWP.
WELLER TWP.
STONE ARCH (263.08)
BRIDGE (263.03)
STONE ARCH (262.93)
X old Summit 262.15
STONE ARCH (266.08)
PAVONIA
261M
2°20'
BRIDGE Nº (260.52)
RICHLAND CO
WELLER TWP.
MILTON TWP.
ASHLAND CO.
BRIDGE Nº47 (259.96)
CRAWFORDS RUN
ARCH CULVERT (259.83)
259M
258M
BRIDGE (257.81)
STONE ARCH (257.25)
257M
STONE ARCH (269.57)
ELECTRIC STREET RY. CROSSING
MANSFIELD
B&O R.R. CROSSINGS
P.Ft.W.&C. R.R. CROSSING
BRIDGE Nº49 (268.49)
"S.K." TOWER
CORPORATION LIMITS
BRIDGE (267.38)
STONE ARCH (266.68)
STONE ARCH (266.08)
MADISON TWP.
FRANKLIN TWP.
MADISON "MA" TOWER
FRANKLIN TWP.
WELLER TWP.
BRIDGE (263.82)
STONE ARCH (263.08)
BRIDGE (263.03)
STONE ARCH (262.93)
PAVONIA
BRIDGE (260.52)
RICHLAND CO
WELLER TWP
MILTON TWP
ASHLAND CO
BRIDGE (247.81) OVERHEAD
"GA" TOWER
MILTON "GA" TOWER


PAVONIA
BRIDGE (268.52
RICHLAND CO
MILTON TWP
BRIDGE Nº48(259.94)
STONE ARCH (259.83) ASHLAND CO
BRIDGE Nº47(259.83) OVERHEAD
BRIDGE Nº46½ (259.04) OVERHEAD
BRIDGE (247.85) OVERHEAD
12' STONE ARCH (257.26)
STONE ARCH (257.25)
"GA" TOWER
STONE ARCH (256.5)
MILTON "GA TOWER
BRIDGE Nº (254.09)
MILTON TWP
MONTGOMERY TWP
CORPORATION LIMITS
ASHLAND
BRIDGE Nº46½ (251.63)
CORPORATION LIMITS
BRIDGE (250.36)
BRIDGE (249.76)
BRIDGE (249.60)
MONTGOMERY TWP
ORANGE TWP
BRIDGE Nº (260.53)
BRIDGE Nº46 (259.44)
ARCH CULVERT (259.83)
BLACK FORK
RICHLAND CO
WEILER TWP
MILTON TWP
ASHLAND CO.
CRAWFORD'S RUN
BRIDGE Nº47 (259.44)
BRIDGE (257.85)
12' STONE ARCH (257.26)
STONE ARCH (257.25)
STONE ARCH (256.5)
G.A. TOWER MILTON
BRIDGE Nº (254.09)
MILTON
MONTGOMERY TWP
TWP
STATE OF OHIO



No. 585,
Erie R. R. Co.
v.
Marietta
} 293.

Plaintiffs Ex. B.

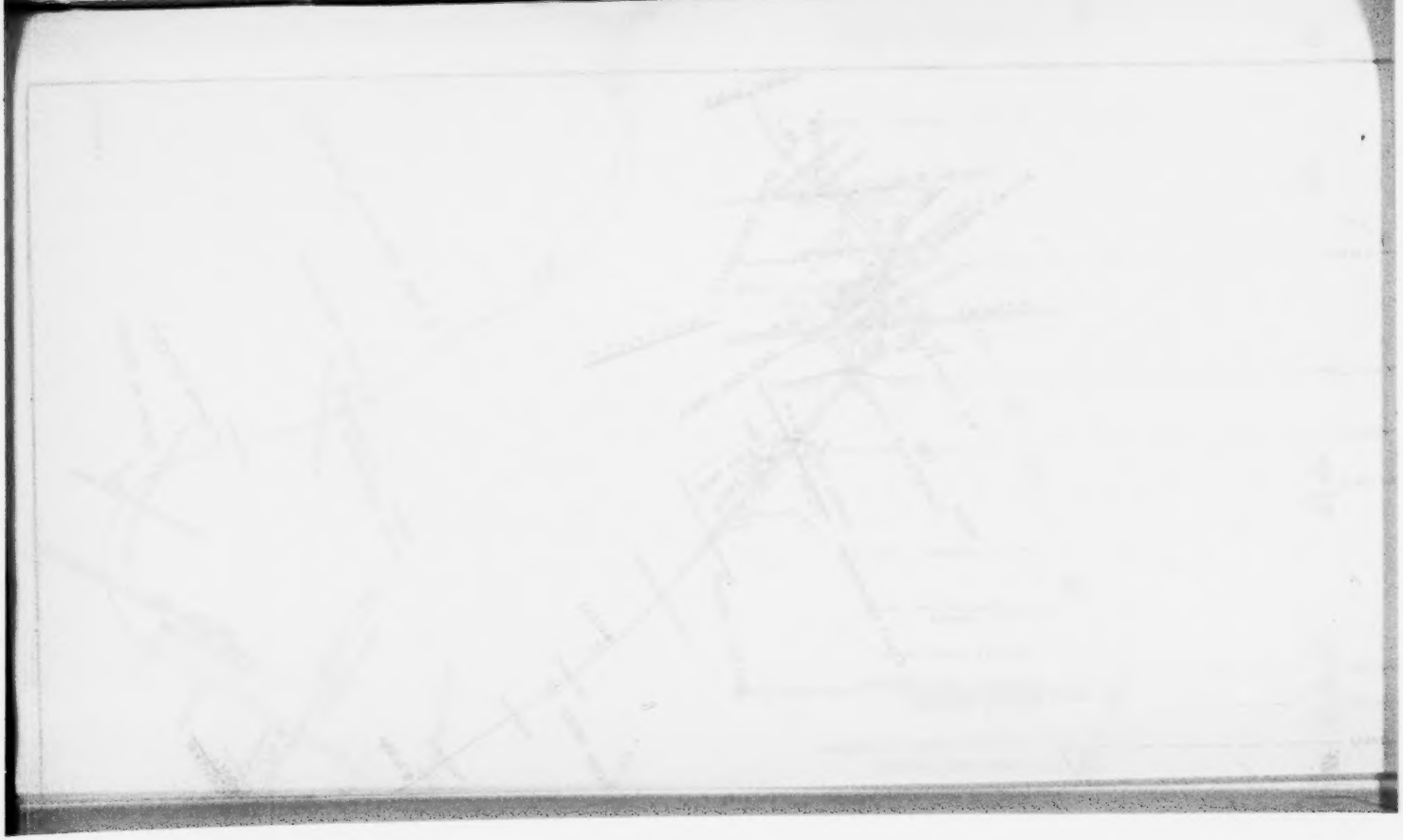
ERIE RAILROAD Co.

CINCINNATI DIVISION EAST.

SCALE: 1/6 OF 1 FOOT = 2500 FEET.

1/6 OF 1 FT. = 0.5 M. = 1 MILE

W.T.◇ WATER TANK
COALING STATION
BLOCK TOWER
WATER CRANE
BLOCK STATION.



Dep't Exh. A

S—1.09—6M

ERIE RAILROAD COMPANY

CHICAGO & ERIE RAILROAD COMPANY
NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. NEW JERSEY & NEW YORK RAILROAD CO.

STATE OF .....
COUNTY OF ..... } ss.

Bryan Marietta

~~being duly sworn~~ says: I reside at R.F.D. #2, % P.W. Hutchinson Street, Marquess O.; am 19 years of age, and am a Stn. Employee by occupation. I recall the occasion of the accident to Myself at Old Summit Town, O., on Jan. 5th about 6 a.m. 1912 which was witnessed by the following named-persons:

NAME	ADDRESS

When this accident occurred I was walking east on the track to go to work at Pavonia on the section. I was first walking east on the east bound track and noticed an engine on the rear of a west bound Train pushing it up the grade this engine was just west of at the brick

grade this engine was just west of at the brick house owned by John Jennings and I was about fifteen or twenty rods east of this engine. At this time I saw a train coming east on the E.B. track. The engine was near the head engine of the freight train on the W.B. track. I thought I would step onto the W.B. Track to get out of the way of the E.B. train & consequently started walking east in the center of the E.B. track. Had gone about a hundred steps on the W.B. track when the E.B. train passed me and just as it had gotten past I felt myself struck from behind but cannot say whether I went under the engine or not. It was very nearly daylight when this occurred & objects were easily distinguished. It was light enough so that a lantern would not have given any light. There is no road crossing within a half mile either direction from the place I was struck. I thought that the engine which struck me would show the train further up the hill so did not pay attention to it.

The above statement was read ~~to~~ by me in the presence of the parties who have signed their names as witnesses hereto, and it is a full, true and correct statement of the facts.

Signed in the presence of

P. S. Dewey.

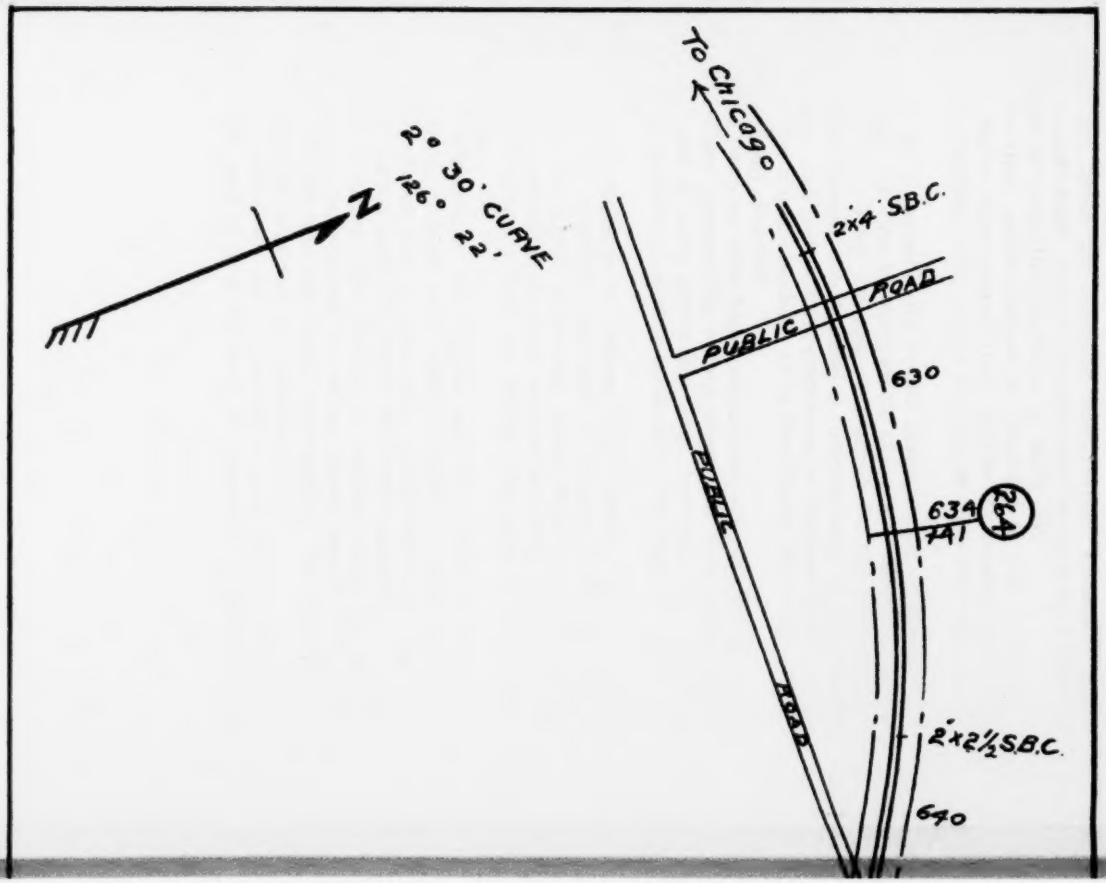
Byron Marietta.

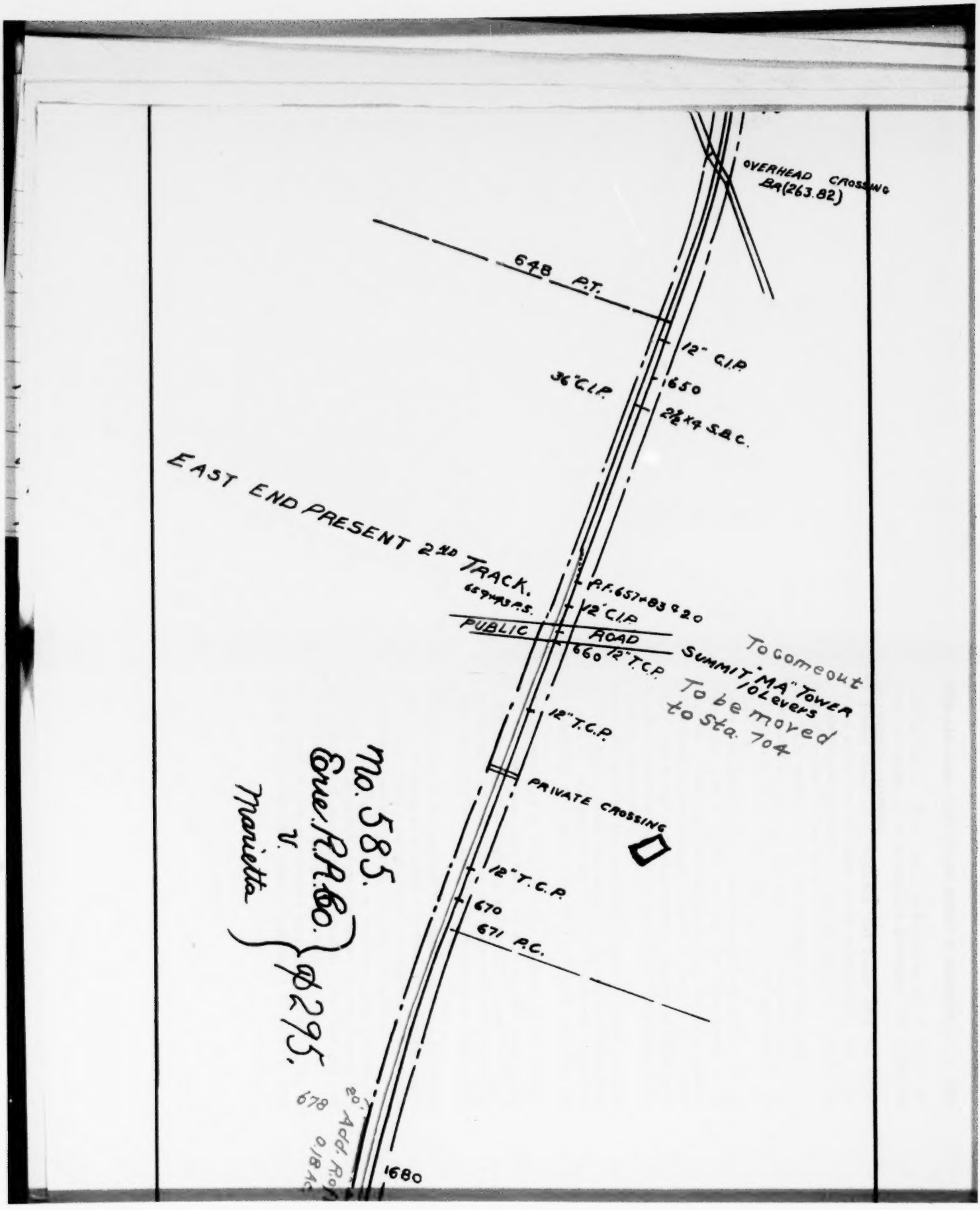
Sworn to before me this 22nd day of Jan 1917

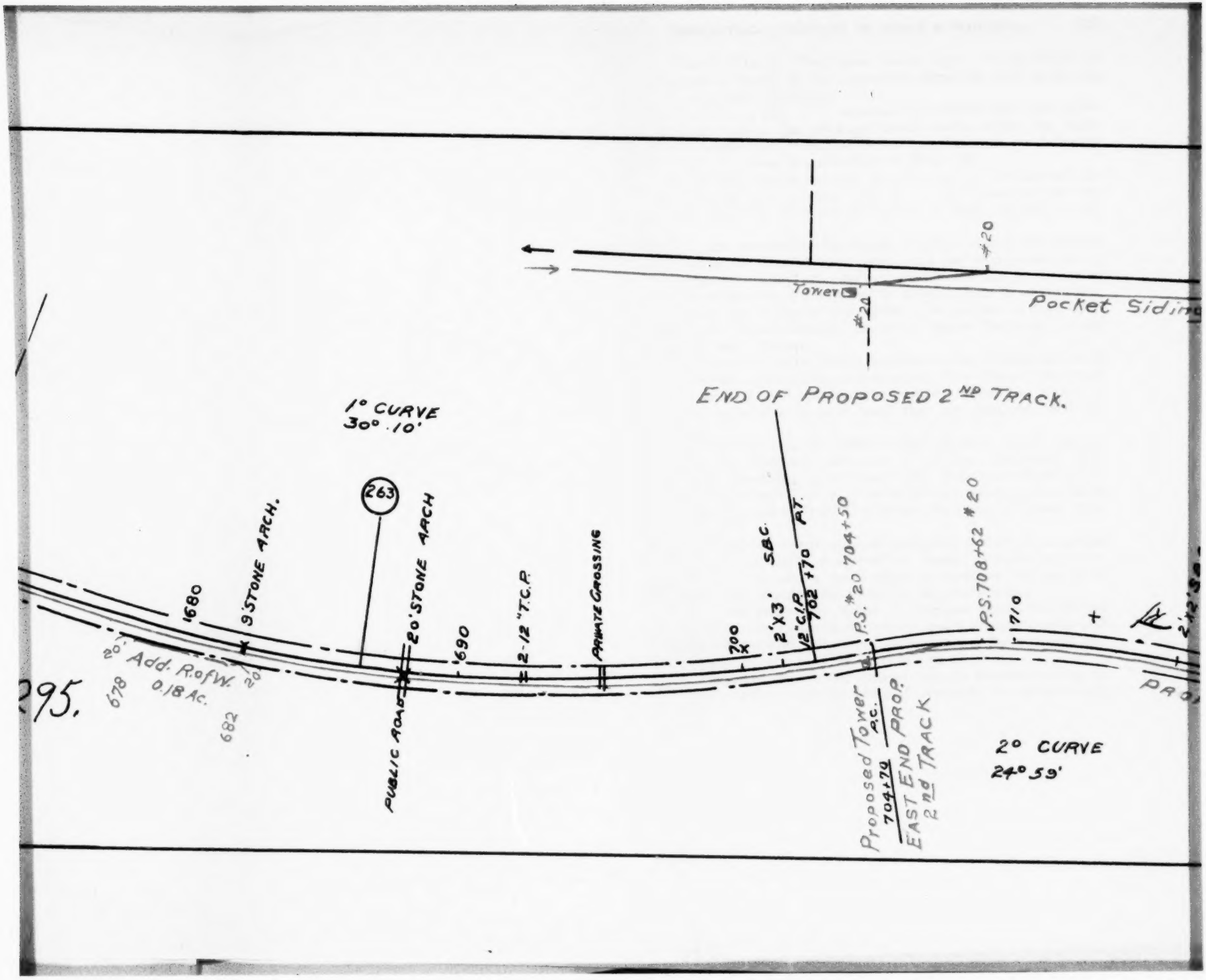
P.S.- I was struck when about ~~three~~ Byron Marietta.
two hundred feet west of old Summit tower. I have no one depending upon me. Married as insurance.

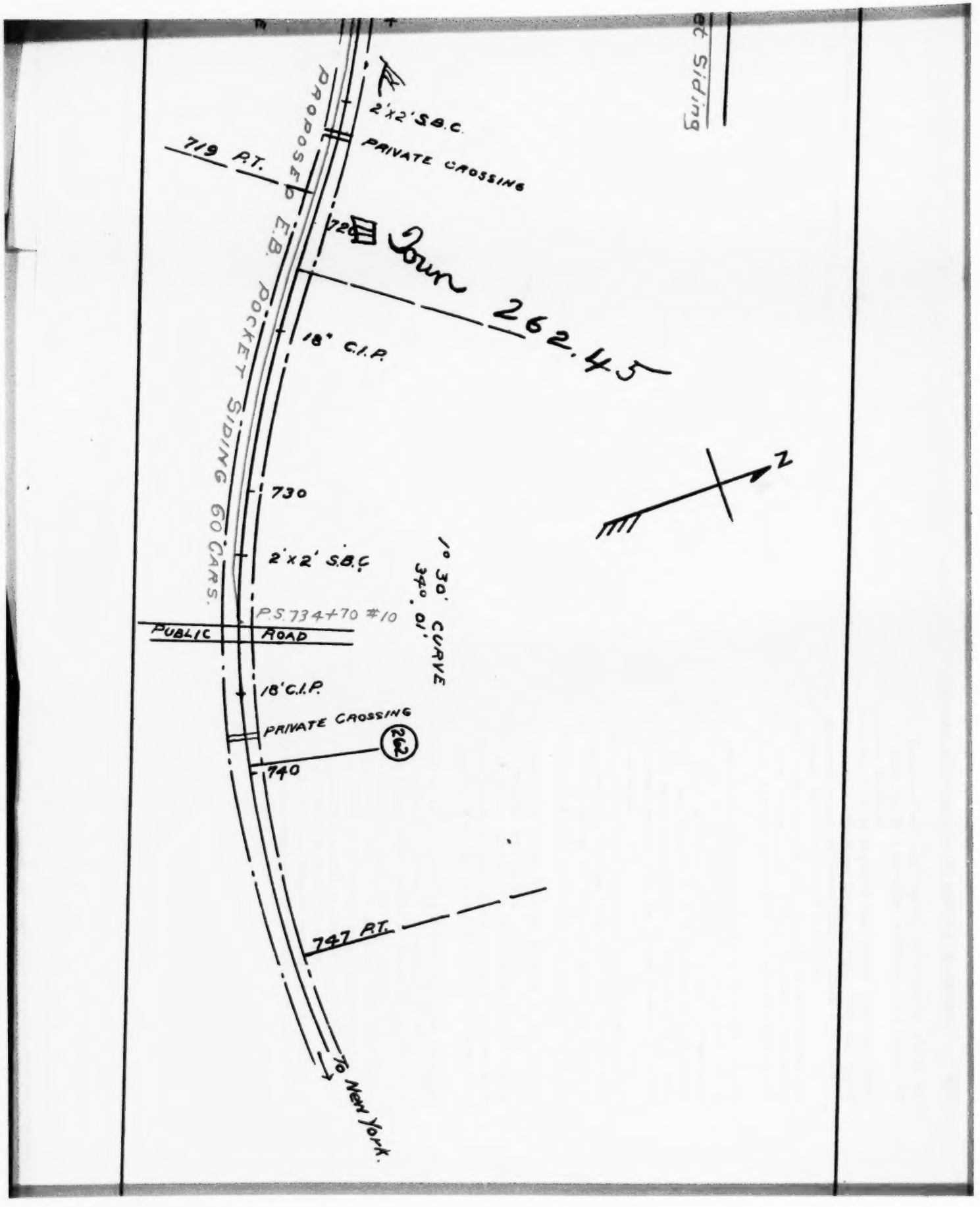
294

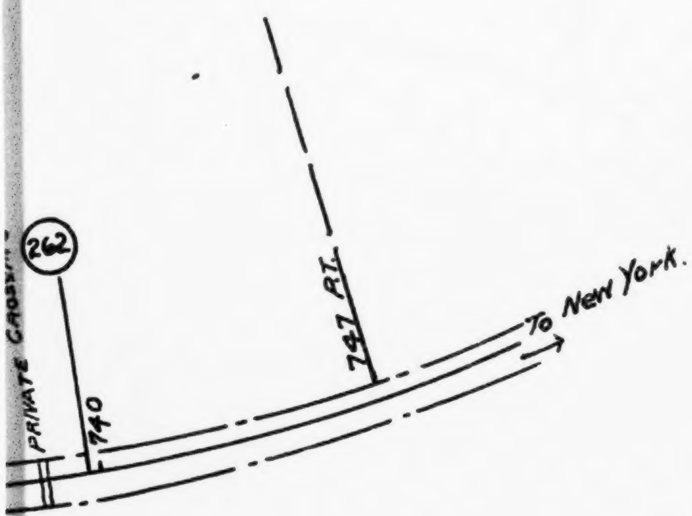
Byron Marietta


TO CHICAGO
2° 30' CURVE
126° 22'
N
2x4" S.B.C.
PUBLIC ROAD
630
634
741
264
PUBLIC ROAD
2"x2½" S.B.C.
640


OVERHEAD CROSSING
BA(263.82)
648 P.T.
12" C.I.P.
650
36" C.I.P.
2½ x 4 S.B.C.
EAST END PRESENT 2ND TRACK.
P.I. 657+83.20
657+43 A.S.
12" C.I.P.
PUBLIC ROAD
660
12" T.C.P.
SUMMIT "MA" TOWER
10 Levers
To come out
To be moved
to Sta. 704
12" T.C.P.
PRIVATE CROSSING
12" T.C.P.
670
671 P.C.
No. 585.
Erie R.R. Co.
v.
Marietta
Ø295.
678
20' Add. Rd.
0.18 Ac.
1680


Tower
#20
#20
Pocket Siding
END OF PROPOSED 2ND TRACK.
1° CURVE
30° 10'
263
9' STONE ARCH.
20' STONE ARCH
1680
690
2-12" T.C.P.
PRIVATE CROSSING
700
2'X3' SBC.
12" C.I.P.
702+70 AT.
P.S. #20 704+50
P.S. 708+62 #20
710
20° Add. R. of W.
0.18 Ac.
678
682
PUBLIC ROAD
Proposed Tower
P.C.
704+79
PROP.
EAST END
2nd TRACK
2° CURVE
24° 59'


Siding
PROPOSED E.B. POCKET SIDING 60 CARS.
2'x2' S.B.C.
PRIVATE CROSSING
719 P.T.
720
Sour 262.45
18" C.I.P.
730
2'x2' S.B.C.
10° 30' CURVE
340.01'
P.S. 734+70 #10
PUBLIC ROAD
18" C.I.P.
PRIVATE CROSSING
262
740
747 P.T.
To New York.
N



ERIE R. R.

PROPOSED SECOND TRACK

MADISON EAST

ASS'T. ENGR'S. OFFICE CLEVELAND, O.

MAY 18, 1906. SCALE 1" = 400'

3-135

296 Double Track.—Two main tracks, upon one of which the current of traffic is in a specified direction, and upon the other in the opposite direction.

107. On double track, it is required that trains take the right-hand track and never the left-hand track, except when the right-hand track is obstructed, when movement may be made by authority of train orders or under the provisions of Rule 108.

108. When train orders cannot be procured to run around an obstruction, trains may proceed from and to the nearest crossovers by sending a flagman, with proper signals, at least one mile in advance.

586. They are responsible for proper management of the engines in their charge, for care of equipment, and for economical use of fuel and supplies. They are also responsible for the performance of duty by their firemen, are required to instruct them in such duties, when necessary, and to report incompetence or neglect of duty upon their part to the Superintendent, or to the Master Mechanic, as the circumstances may demand.

612. When running extra trains enginemen are required to sound the whistle when approaching curves where the view of the track is obscured; and if such curves are long, to repeat the signal at intervals of a quarter of a mile until they are past, or until the view is clear.

618. They are required to instruct their firemen in all matters pertaining to the operation and care of engines, and may allow them to handle the engine at stations, under their immediate supervision, but not to permit them to do so under any other circumstances without written authority from the Master Mechanic or Road Foreman of Engines.

625. It is forbidden to run engines backward, either in passenger or freight service, or light, at a speed to exceed 15 miles per hour, or backward from or past a point where a turntable or wye is located, without special authority from the Superintendent.

634. When running light trains or engines upon the reverse track, enginemen are required to reduce speed around curves and to sound the whistle and bell signal, as necessary, for warning and protecting employes who may be upon the track.

They are required to use the utmost care to prevent killing or injury of stock, and to stop the train, if necessary, to prevent such accident.

297 In the Supreme Court of the United States.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
BYRON B. MARIETTA, Defendant in Error.

Statement of Errors Relied Upon and of Parts of Record to be Printed.

The Plaintiff in Error at the hearing of this cause will rely upon the following errors as set forth in its assignment of errors filed herein to wit:

Now comes the Plaintiff in Error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of Richland County, State of Ohio, in the above entitled matter, there is manifest error in this to wit:

First. That said Court of Appeals erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby depriving this Plaintiff in Error of rights, privileges and *accom-o-dations*, secured to it by the Act of Congress of April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by railroad to their Employees in Certain Cases," to wit:—in this case:—the defense that the defendant in Error had assumed the risks of the defects complained of in his petition.

Second. The said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, whereby said Court of Appeals of Richland County, Ohio, held that this case was governed by section 6245 and section 9017 of the General Code of the State of Ohio and not by the Act of Congress of April 22, 1908, entitled "An Act Relating
298 to the Liability of Common Carriers by Railroads to their Employees in Certain Cases," and that the said statutes of the State of Ohio were not in conflict with, and were not superceded by said Act of Congress.

Third. The said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said Court in refusing to give to the jury the following instruction requested by the Plaintiff in Error to wit:—"If the Plaintiff, for his own convenience, voluntarily went along the tracks of the railroad, and this railroad was being at the time used and operated as a highway of Interstate Commerce, he assumed the risk and danger of so using the tracks." Notwithstanding that it was proved in this case without contradiction that at the time the Defendant in Error received his alleged injuries he was employed in Interstate Commerce by the Plaintiff in Error which was at the time a common carrier by railroad engaged in Interstate Commerce.

Fourth. That the said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of

Richland County, Ohio, thereby affirming the action of said Court in refusing to give the jury the following instruction requested by this Plaintiff in Error, to wit:

If the Plaintiff, in getting off the track upon which he saw a train approaching, could with safety and reasonable convenience have stepped to the right or south of said track, and of his own choice stepped on to a parallel track, and was struck by a train on said parallel track he assumed the risk of such choice."

299 Notwithstanding that it was proved in this case without contradiction that the time the Defendant in Error received his alleged injuries he was emplo[illegible] Interstate Commerce by the Plaintiff in Error which wa[illegible]ime a common carrier by railroad engaged in Interstate Co[illegible].

Fifth. The said Court of Appeal[illegible] of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said Court in charging the jury in its general charge to the jury without giving to or submitting to said jury the assumption of risk on the part of this Defendant in Error and charging the jury generally without submitting the question of the assumption of the risk by the Defendant in Error to the jury and in withdrawing the third defense of answer of Plaintiff in Error from the jury and in charging them to disregard said defense thereby depriving Plaintiff in Error of the defense of assumed risk to which it excepted.

Sixth. The Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said Court in overruling the motion of the Plaintiff in Error at the close of all the evidence for the direction of a verdict in its favor, although, under the Act of Congress April 22, 1908, "An Act Relating to the Liability of Common Carriers by Railroad to their employees in Certain Cases," the Plaintiff in Error by reason of uncontradicted proof showing knowledge on the part of the Defendant in Error of the conditions complained of in his petition and an assumption of the risks thereof, was, in a matter of law entitled to the direction of such a verdict.

300 Wherefore, the Erie Railroad Company prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught and that it may be restored to all things which it has lost by the action and because of said judgment and decision.

For the proper consideration of said error the Plaintiff in Error deems it necessary and hereby requests the clerk to cause to be printed the following portions of the record herein:

1. Return and certificate by clerk of the Court of Appeals of Richland County, O.
2. Petition for allowance of writ of error.
3. Assignment of errors.
4. Order allowing writ of error.
5. Writ of error.

6. Citation & Proof of service of same.
7. Motion filed in the Supreme Court of Ohio for an order directing the Court of Appeals to certify its record.
8. Certified entry of the clerk of Supreme Court overruling said motion.
9. Petition in error filed in the Supreme Court of the State of Ohio.
10. Motion to strike from files petition in error filed in Supreme Court of Ohio.
11. Certified copy of record by the Clerk of the Supreme Court of Ohio showing the sustaining of the motion.
12. Certification of the reporter of the Supreme Court showing no opinion was handed down in the disposition of either of these motions.
13. Bond on writ of error, Filed by Judge R. S. Shields.

301 14. Copy of docket entries.
15. Certificate of clerk of Court of Appeals of Richland County, Ohio.
16. Certificate of lodgment.
17. Petition in error to the Court of Appeals of Richland County, Ohio.
18. Docket entries of the Court of Appeals of Richland County, Ohio.
19. Certified copy of opinion of the Court of Appeals of Richland County, O.
20. Petition in the Richland County Common Pleas Court.
21. Amended answer filed in Richland County Common Pleas Court.
22. Reply to amended answer filed in Richland County Common Pleas Court.
23. Motion for new trial Richland County Common Pleas Court.
24. Docket entries Richland County Common Pleas Court.
25. Bill of Exceptions Richland County Common Pleas Court.
26. So much of Plaintiff's Exhibit "A" Book of Rules as was introduced in evidence as indicated by Bill of Exceptions.
27. Defendant's Exhibit "A" in its entirety.
28. Defendant's Exhibit "B" map.
29. Plaintiff's Exhibit "B" map.

C. E. McBRIDE,
N. M. WOLFE,
Att'ys for Pl'ff in Error.

I hereby acknowledge service upon me of a copy of the foregoing statement.

W. S. KERR,
Att'y for Defendant in Error.

302 [Endorsed:] 585/24,868. No. 52. Erie Railroad Co., Pl'ff in Error, vs. Byron B. Marietta, Def't in Error. Statement of Errors, etc. McBride & Wolfe, Att'ys for Pl'ff in Error.

Filed, Court of Appeals, Richland County, Ohio, Jul- 30. 1915. J. V. Finney, Clerk.

303 [Endorsed:] File No. 24,868. Supreme Court U. S., October term, 1915. Term No. 585. Erie Railroad Company, Pl'ff in Error, vs. Byron B. Marietta. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed. with proof of service of same. Filed August 4, 1915.

Endorsed on cover: File No. 24,868. Ohio, Richland County, Court of Appeals. Term No. 585. Erie Railroad Company, plaintiff in error, vs. Byron B. Marietta. Filed August 4th, 1915. File No. 24,868.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 211.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

EVYLYN J. PURUCKER, ADMINISTRATRIX OF BYRON B. MARIETTA, DECEASED.

BRIEF OF PLAINTIFF IN ERROR.

C. E. McBRIDE,
N. M. WOLFE,
Attorneys for Plaintiff in Error.

(24,868)

SUBJECT INDEX.

List of Cases Cited.

SUPREME COURT OF THE UNITED STATES.

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EVYLYN J. PURUCKER, ADMINISTRATRIX OF BYRON B. MARIETTA, DECEASED, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This was a civil action instituted in the Court of Common Pleas of Richland County, Ohio, to recover damages for injuries sustained by Byron B. Marietta, which were alleged to have been caused by the wrongful act and negligence of plaintiff in error, Erie Railroad Company. The case was brought by Marietta during his lifetime and was tried during his lifetime and judgment was rendered in said court in favor of the plaintiff for $12,000 with costs, which judgment was affirmed by the Court of Appeals of Richland County, Ohio. (For opinion see Record, pages 14-23.) To this judgment the plaintiff in error, Erie Railroad Company, filed a motion in the Supreme Court of Ohio asking that court to require the Court of Appeals of Richland County,

Ohio, to certify its record to said court on the ground, as stated in the motion, that it involved a question of public or general interest, but the Supreme Court of the State of Ohio overruled said motion and refused to require said Court of Appeals to certify up its record. (For motion see page 24 of Record, and for disposition of same see page 25, and that no opinion was rendered see page 33 of Record.)

Thereupon the plaintiff in error, Erie Railroad Company, filed its petition in error in the Supreme Court of Ohio, stating and claiming the right to file the same by reason of the fact that it involved a question arising under the Constitution of the United States, to which petition in error the defendant in error, Byron B. Marietta, filed a motion asking that the petition in error be stricken from the files. Upon a hearing had this motion was sustained and the petition in error ordered stricken from the files by the Supreme Court of Ohio. (For petition in error see page 26 of Record; for motion to dismiss see page 27 of Record; for disposition of motion see page 29 of Record, and for no opinion rendered see page 33 of Record.) This makes the judgment of the Court of Appeals the judgment of the court of last resort in the State of Ohio.

The case is brought here by the Erie Railroad Company, claiming that said judgment is inconsistent with and a violation of the provisions of the act of Congress entitled "An act relating to the liability of common carriers by said roads to their employees in certain cases," approved April 22, 1908, enacted in pursuance of article 1, section 8, clause 3 of the Constitution of the United States, and that said judgment deprives the plaintiff in error of rights, privileges and immunities to which it is entitled under said article of the Constitution and the provision of said act.

The Ohio courts held the Federal act inapplicable, whereas the plaintiff in error claims that it applies and that the judgment rendered under the State law operates as a denial of rights under the Federal act.

The facts disclosed by the evidence, so far as material here,

are as follows: On the morning of January 5, 1912, Byron B. Marietta, employed as a section man or track builder and repairer, by the Erie Railroad Company, while walking on the track of the Erie Railroad Company on his way to his work was struck and injured by an engine which was being moved and operated along the track of the Erie Railroad Company by employees of said Erie Railroad Company. (Allegations of petition and complaint, see pages 1 and 2 of Record; admissions by amended answer, page 4 of Record.)

It appears from the uncontroverted evidence that on the morning of the accident Marietta started from the home of his uncle and walked down a lane to the Erie track and thence started to walk north on the track to the place where he was to begin his day's work. The Erie is a double-tracked railway. Trains running to the eastward usually run on the south track and trains running to the west usually run on the north track. There is no cross-over from one track to the other here nor for miles either way. Before Marietta reached the track he saw a freight train going west on the north track with an engine at the head of it and another engine in the rear pushing the train or assisting the train up the grade there, which is sharp.

This train, with an engine in front and rear, passed him just a short distance before he reached the track. Both engines and the entire train were in his full view as it passed along. The engine that was pushing the freight train up the hill was an engine that had been detached from its train that was standing down the track to the eastward about one-half mile. While Marietta claims he did not see the train from which the engine was detached standing down there to the east, the evidence shows that it was in plain view of him all the time from the time he left his home until and after he reached the track, and if he had looked he could have seen it. And in his petition Marietta says: "And that if said engine had helped the said freight train up the grade it had been the custom to push the other train to the top of the grade, which was about two miles from where the plain-

tiff was struck," showing a knowledge on his part of the fact that trains were helped up this grade. The evidence further shows that this was done frequently, and when they pushed them up the grade sufficiently the helping engine was detached and that it ran back over the same track to where it left its train standing and then coupled up to it again and resumed its trip. Marietta went first upon the south track. In a signed statement given by himself on the 22d day of February, 1912, he says:

> "When this accident occurred I was walking east on the track to go to work at Pavonia on the section. I was first walking east on the eastbound track and noticed an engine on the rear of the westbound train pushing it up the grade; this engine was just west of the brick house owned by Jennings and I was about fifteen or twenty rods east of this engine. At this time I saw a train coming east on the eastbound track. Its engine was near the head engine of the freight train on the westbound track. I thought I would step onto the westbound track to be out of the way of the eastbound train, and consequently started walking east in the center of the eastbound track. Had gone about one hundred steps on the eastbound track when the eastbound train passed me, and just as it had gotten past I felt myself struck from behind." (See statement marked Defendant's Exhibit A in back part of record.)

When the eastbound train passed it made a lot of smoke. Except the smoke there was nothing to obscure the vision of Marietta. If he had looked, he could have seen the engine backing back for a long distance, and if he had listened he could have heard it coming. He did neither, but continued to walk in the center of the rails of the westbound track. The evidence shows that the train from which the engine was detached and to which it was backing back to be coupled up to was made up of cars destined to Hammond, Indiana; Fargo, Ill.; Wilgers, Ind.; Griffith, Ind.; Bridgeport, Okla.; Granite City, Mich. (See page 141 of Record.) The train

going east on the eastbound track just prior to the accident was a Chicago-New York train, the Wells Fargo express from Chicago to New York. (See page 178 of Record.)

It is averred in the answer of the Erie Railroad (see page 4 of Record) that "its railroad extends from Ohio into other States of the United States of America, and at all times in the petition mentioned it conducted over said railroad and each part thereof commerce between Ohio and such other States as a common carrier by railroad; that all of plaintiff's duties in its employ were in the maintenance of said railroad, its tracks and roadbed, in suitable condition for use in such interstate commerce."

Assignment of Errors.

(Record, pages 38 and 39.)

First. That said Court of Appeals erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby depriving this plaintiff in error of rights, privileges and accommodations secured to it by the act of Congress of April 22, 1908, entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," to wit, in this case: the defense that the defendant in error had assumed the risks of the defects complained of in his petition.

Second. The said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, whereby said Court of Appeals of Richland County, Ohio, held that this case was governed by section 6245 and section 9017 of the General Code of the State of Ohio and not by the act of Congress of April 22, 1908, entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," and that the said statutes of the State of Ohio were not in conflict with and were not superseded by said act of Congress.

Third. The said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said court in refusing to give to the jury the following instructions requested by the plaintiff in error, to wit:

> "If the plaintiff, for his own convenience, voluntarily went along the tracks of the railroad and this railroad was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks,"

notwithstanding that it was proved in this case without contradiction that at the time the defendant in error received his alleged injuries he was employed in interstate commerce by the plaintiff in error, which was at the time a common carrier by railroad engaged in interstate commerce.

Fourth. That the said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said court in refusing to give the jury the following instruction requested by this defendant in error, to wit:

> "If the plaintiff in getting off the track upon which he saw a train approaching, could with safety and reasonable convenience have stepped to the right or south of said track, and of his own choice stepped on to a parallel track and was struck by a train on said parallel track he assumed the risk of such choice,"

notwithstanding that it was proved in this case without contradiction that at the time the defendant in error received his alleged injuries he was employed in interstate commerce by the plaintiff in error, which was at the time a common carrier by railroad engaged in interstate commerce.

Fifth. The said Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Com-

mon Pleas of Richland County, Ohio, thereby affirming the action of said court in charging the jury in its general charge to the jury without giving to or submitting to said jury the assumption of risk on the part of this defendant in error and charging the jury generally without submitting the question of the assumption of the risk by the defendant in error to the jury, and in withdrawing third defense of the answer of plaintiff in error from the jury and in charging them to disregard said defense, thereby depriving plaintiff in error of the defense of assumed risk, to which it excepted.

Sixth. The Court of Appeals of Richland County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Richland County, Ohio, thereby affirming the action of said court in overruling the motion of the plaintiff in error at the close of all the evidence for the direction of a verdict in its favor, although, under the act of Congress of April 22, 1908, "An act relating to the liability of common carriers by railroad to their employees in certain cases," the plaintiff in error, by reason of uncontradicted proof showing knowledge on the part of the defendant in error of the conditions complained of in his petition and an assumption of the risks thereof, was, as a matter of law, entitled to the direction of such a verdict.

ARGUMENT.

Does the Federal Act Apply?

The only question presented in this case which might be thought not to be altogether foreclosed by the decision of this court is whether or not the Federal act applies. If it does, the judgment must be reversed, for the reason stated in the several assignments of error, viz: That the Erie Railroad Company was deprived of its defense of assumed risk which it was entitled to make under the Federal act and which the record fully discloses to be the fact, as it appears very fully from the record that the court undertook to apply a remedy in this case based upon the Ohio statutes and not on the Federal act.

Section 4 of said act is as follows:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee."

The question was raised in a timely way in the answer (Record, page 4) by motion for judgment of nonsuit made at the close of plaintiff's evidence and renewed at the close of all the evidence (Record, pages 126 and 196) and in requests for instructions to the jury, and the point was duly preserved by exceptions and assignments of error.

The judgment of the Court of Appeals of Richland County, Ohio, affirming the lower court, rests on the proposition that Marietta did not suffer injury while employed in interstate commerce by a carrier engaging at the time in interstate commerce. (See Record, pages 14 to 23, inclusive, for opinion of the court.)

In *Toledo, St. Louis & Western R. R. Company vs. Slavin,* 236th U. S., 454:

> "A controlling Federal question is necessarily involved in a judgment of a State court to measure the liability of the defendant interstate railway carrier in an action by an employee to recover damages for personal injuries, by the Employers' Liability Act of April 22, 1908 (35th Stat. at L., 65; chap. 149, Comp. Stat., 1913, section 8657), where, although the pleadings contained no reference to the act, evidence was admitted over plaintiff's objection which showed that the train on which he was riding at the time of the injury was engaged in interstate commerce, whereupon the defendant carrier insisted that the case was governed by that statute and that its application and enforcement would defeat any recovery."

Second syllabus:

> "The Employers' Liability Act of April 22, 1908, governs an action by an injured employee against an interstate railway carrier, to the exclusion of any applicable State statutes, although the pleadings contained no reference to the Federal act, where the evidence on the trial shows that the train on which the plaintiff was riding at the time of the injury was engaged in interstate commerce."

In *St. L., S. F. & T. R. R. Co. vs. Seale,* 229th U. S., 156, at 161, we have:

> "When the evidence was adduced it developed that the real case was not controlled by the State statute, but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the State court erred in overruling it."

In Ohio the assumption of risks of injuries occasioned by defects in tracks is abolished by statute, while the Federal statute left that common-law rule in power, except in those instances where the injury was due to the defendant's violation of the Federal statutes, which were passed for the protection of interstate employees.

The question of the applicability of the Federal act narrows itself into the question whether Marietta at the time he was struck was employed in interstate commerce. If he was so employed at that time, and we think the evidence fully shows he was, the railroad company must have been engaged in interstate commerce *through him*. *Colosurda vs. Central R. R. Co. of N. J.*, 180 Federal, 832. If not, the act does not apply, for it is necessary to its applicability that the employee should have been so employed at the time of injury. Therefore, while the record shows that he was going to work on a track over which interstate trains were run and that he was on the company's track nearing his place of work and was struck by an engine detached from a train hauling cars engaged in interstate commerce, we will not stop to discuss that feature. (See *Pederson vs. Delaware, L. & W. R. R. Co.*, 229th U. S., 146.)

Coming now to the status of Marietta, we find that he at the time he was struck was employed as a section man in repairing and maintaining the tracks of the Erie Railroad Company and was going to his place of work in pursuance of an order of his superior and was walking on the company's track, a route selected by himself, and was struck by an engine that was engaged in hauling cars designed for cities in different States and so engaged in interstate commerce. Marietta was at no time engaged in work other than interstate, because the tracks were for the purpose of carrying on interstate commerce. The testimony clearly shows that the cars from which the engine was detached were in the course of a thorough interstate journey, and the natural inference from the testimony is that some at least of the cars were loaded with interstate freight, though that feature

is immaterial, the cars being employed in interstate commerce regardless of whether they were loaded or empty, and the train passing on the other track was an interstate train, being the Wells Fargo Express from Chicago to New York.

Johnson vs. Southern Pacific Co., 196th U. S., 1, 21.

Northern Pacific Railway Co. vs. Maerkel (*C. C. A.*), 198 Federal, 1.

Pederson vs. Delaware, etc., R. R. Co., 229th U. S., 146.

Was Marietta when on his way to work on the track as a section man or track repairer of tracks and roadbed, over which interstate trains ran, engaged in interstate service? Apply the test declared by this court to be the proper one in *Pederson vs. Delaware, L. & W. R. R. Co.*, 229th U. S., 146 (where an iron worker carrying from a tool-car to a bridge, over which both interstate and intrastate commerce regularly passed, bolts to be used that night or next morning in the repair of the bridge was held to be employed in interstate commerce).

The true test always is:

> "Is the work in question a part of the interstate commerce in which the carrier is engaged" (page 152).

The court adds:

> "The point is made that the plaintiff was at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task, which was essentially a part of a larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate com-

> merce." (See *Lamphere vs. Oregon R. & Navigation Company,* 196th Federal Reports, 336; *Huston vs. Oregon, etc., Co.,* 130 Pac. Rep., 897; *Johnson vs. Southern Pacific Co.,* 196th U. S., 1, 21.)

Apply also the test suggested in the Lamphere case (C. C. A., 9th Cir.), cited by this court as appears above, where a fireman while on his way to relieve the crew of an interstate train was run over by the negligence of the crew of another train:

> "As indicated in the opinion the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, what is its effect upon interstate commerce? Does it have the effect to hinder, delay or interfere with such commerce?

In *St. Louis, etc., Ry. Co. vs. Seale,* 229th U. S., 156, the act was held to apply to fatal injury to a yard clerk, who when killed was on his way to meet an incoming train carrying interstate commerce, his duty being to check the cars.

See *North Carolina R. R. Co. vs. Zachary,* 232 U. S., 248 (where a fireman in the employ of an interstate railway carrier, after inspecting, oiling, firing, and preparing his engine for the interstate haul of a train containing some cars that had come from another State, was killed by a switch engine while he was attempting to cross tracks intervening between the engine and line boarding-house, it was held the evidence was at least sufficient to require the submission to the jury of the question of the carrier's liability act of April 22, 1908).

Neil vs. Idaho, etc., R. R. Co. (Idaho), 125th Pac., 331, 336 (where the conductor of a freight train, standing on a side track preparatory to service in interstate commerce, was struck while walking along another track inspecting his train).

Horton vs. Oregon, etc., Co. (Wash.), 130th Pac., 897 (where a pumper at a pumping station for locomotives used

in both intrastate and interstate commerce was struck by a train while on his way to work).

Freeman vs. Powell (*Texas*), 144th S. W., 1033 (where the employee was injured while lifting a block of ice for the purpose of carrying same to cars containing interstate passengers).

The 128th Pacific, 393, where it was held that an employee engaged in installing a new block system along the tracks, which was designed to protect both State and interstate trains, was engaged in interstate commerce.

The 81st S. E., 283, where it was held that an employee asleep in the bunk of his shanty car after laying rails on an interstate road during the day was engaged in interstate commerce.

The 168th S. W., 328, where it was held that a section man engaged in sweeping snow from switches, killed by a train engaged in both intrastate and interstate commerce, was engaged in interstate commerce. These decisions compel an affirmative answer to the question whether Marietta was employed in interstate commerce while on his way to work on a track over which trains engaged in interstate commerce ran.

San Pedro, etc., R. R. Co. *vs.* Davide, 210 Fed., 870.
Manson *vs.* Great Northern Ry., 155 N. W., 32 (N. D.).
Cicalese *vs.* L. V. R. R., 75th N. J. L., 879.

Situation at Moment of Accident.

The petition alleged (Record, page 1):

> "That on the 5th day of January, 1912, and for a period of about six weeks prior thereto the plaintiff was in the employ of as a section man; it was his duty to work on the track of the defendant and whenever directed by the section foreman."

Also the petition avers (Record, page 1)—

> "that just prior to the time plaintiff received the injuries hereinafter set forth he was directed by the foreman to come from the place where he boarded to a point about a quarter of a mile north or east of a tower located on this section of defendant's track upon which he was employed as aforesaid; that in obedience to said directions he walked to the defendant's track from his boarding place and started east on the track to go to the place as directed by the foreman and there to work on the morning of the said 5th day of January."

And while he was walking along the track to his place of work, he was struck and injured. The answer admits (page 4 of Record) his employment and admits that he was struck while on the track.

The pleadings establish the status of Marietta at the time of his injury. There is nothing in the evidence tending in any way to weaken this statute.

In this state of the record it is clear that if Marietta was on duty at the time of the accident such duty must be assigned to his employment as a section man or track repairer over which interstate trains ran. If on duty, then, he was employed in interstate commerce. If we apply the test which the Court of Appeals, in the Lamphere case, deduced from the expressions of this court in Meridon *vs.* New York, etc., R. R. Co., 223 U. S., 1, it is found that the injury of Marietta directly hindered and delayed interstate commerce. Can there be any doubt that Congress in legislating for the safety of interstate commerce and those employed in it intended the act to apply in such a case?

The reasoning in Philadelphia, etc., R. R. Co. vs. Tucker, 35th App. D. C., 123, *is pertinent.*

There plaintiff brought suit under the Federal Employers' Liability Act of 1906 for injuries received by the plaintiff's intestate as he was crossing the defendant's tracks on his way to assume his duties as fireman. The defendant rail-

road company urged that at the time of the accident the plaintiff's intestate was not on duty, was not in the actual service of defendant, and was not employed within the contemplation of the Employers' Liability Act of 1906. But the court overruled this contention, saying (pp. 139-140):

> "When Tucker was killed he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume and for their mutual interest and advantage. Can it be that under such circumstances the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, that the relation of master and servant, in so far as the obligation of the master and servant to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task."

In *Ewald vs. Chicago, etc., R. R. Co.*, 70th Wisc., 420; 36 N. W., 12, 14, an action for personal injury, it was held that an engine wiper employed in defendant's roundhouse while going to his work along a pathway crossing defendant's right of way was an employee of the defendant, the court saying that plaintiff, while passing along the pathway, was an em-

ployee "as much as while actually laboring for the company in the roundhouse, and as much within his contract of employment."

In *Boldt vs. New York, etc., R. R. Co.,* 18th N. Y., 432, plaintiff was injured while walking upon his employer's (defendant's) premises going to his work. The court held that he was an employee at the time, saying:

> "But he was in the defendant's employment and doing that which was essential to enabling him to discharge his particular duty, namely, going to the spot where it was to be performed, and he was moreover going on the track, where, except as the servant of the company, he had no right to be. He was there as an employee of the company and because he was such an employee."

The idea that a servant is to be deemed on duty, though he may not at the moment be actively doing anything in the furtherance of the master's work, is well illustrated by the authorities construing the Federal hours of service act. *Missouri, etc., Ry. Co. vs. United States,* 231 U. S., 112.

As, then, Marietta was on duty at the time of the accident and as such duty must be assigned to the character of duty being performed, viz., in interstate commerce, Marietta was injured while employed in interstate commerce.

We Were Entitled to Defense of Assumed Risk.

Having shown that Marietta was clearly engaged in interstate commerce work at the time of his injury, we were clearly entitled to have been given the full benefit of the defense of assumed risk.

We raised this question by our answer (Record, page 4), by our motion asking for judgment of non-suit, by requests to charge (pages 202 and 203), by exceptions to the charge given (Record, page 202), and by urging it in motion for new trial in all the courts.

We asked the court to give two requests, as follows (Record, pages 202 and 203):

> "If the plaintiff, for his own convenience, voluntarily went along the tracks of the railroad and this railroad was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks."

Also:

> "If the plaintiff in getting off the track on which he saw a train approaching, could with safety and reasonable convenience have stepped to the right or south of such track, and by his own choice stepped on a parallel track and was struck by a train on such parallel track, he assumed the risk of such choice."

Both of these requests the court refused to give, to which ruling separate exceptions were taken and preserved (Record, pages 202 and 203). In instructing the jury on the question of assumption of risk a concrete instruction applicable to that phase of the evidence should be given, and the court should not couch the instruction in such general and sweeping language that it is not calculated to give the jury an accurate understanding of the law upon the subject.

Norfolk & W. Ry. Co. vs. Earnest, 229th U. S., 114:

In an action under Federal act the plaintiff, an engineer, was injured by the explosion of a water glass on which the gauge was missing.

The United States Supreme Court, in Seaboard A. L. Ry. Co. vs. Horton, 233 U. S., 492, and 239th U. S., 595, held that the State trial court committed reversible error in refusing to give the following instruction:

> "If you find by a preponderance of the evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass and condition of the glass was open and obvious and was fully known to the plaintiff, and he continued

> to use such water glass with such knowledge and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use."

Now, in the case at bar, the court not only refused to give the instructions asked for, touching assumed risk, but instructed the jury wholly on contributory negligence.

This was not a defense either under the Federal act or by the statute of Ohio. It could only be considered by the jury on the matter of mitigation of damages, while assumed risk is a complete defense.

Distinction Between Assumed Risk and Contributory Negligence.

The distinction between assumption of risk and contributory negligence under the Federal act is important, for the reason that except as to violation of Federal statutes for the protection of employees, assumption of risk is an absolute defense, and contributory negligence only reduces the damages. As construed by the Supreme Court of the United States, an employee assumes the ordinary risks and hazards of his occupation and also those defects and risks which are known to him, or are plainly observable, although due to the master's negligence. Contributory negligence, on the other hand, is the omission of the employee to use those precautions for his own safety which ordinary prudence requires.

In an action under the Federal Employers' Liability Act, the Supreme Court of the United States described the distinction in the following language:

> "And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared, that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death

of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible. The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee."

Seaboard A. L. Ry. Co. vs. Horton, 233 U. S., 492:

And in the opinion of the above case, on page 508, the Supreme Court says:

"Defendant was entitled to have the requested instruction given respecting assumption of risk, and as the charge actually given did not cover the same ground there was error."

Now, in the case at bar, the court not only refused to give the several instructions requested and did not cover the same ground in the charge actually given, but gave an entirely and wholly different charge, covering an entirely different ground. We think there is clearly error here.

In *Southern Ry. Co. vs. Jacobs*, 116th Va., 189, 1st syllabus:

"Although an employee of an interstate railroad was, at the instant of injury, engaged in a local yard in shifting cars engaged in intrastate commerce, if the shifting and movement of the cars at the time had for its object the making of an interstate train, the employee was engaged in interstate commerce within the meaning of the Federal Employers' Liability law."

Fourth syllabus:

> "Assumption of risk is a doctrine wholly distinguishable from that of contributory negligence, which is a breach of legal duty imposed by law upon the servant, however unwilling or protesting he may be, while assumption of risk is not a duty, but is merely voluntary on the part of the servant."

In the case of *Louisiana & Texas Lumber Co. vs. Brown*, 50th Texas Civ. App., 482, it is held:

> "Assumed risk and contributory negligence are distinct doctrines of law. The distinction, briefly and generally stated, is where negligence or want of proper care on the part of a person brings about injury which he suffers, then contributory negligence could be applied to his act; where a servant is injured from one of the mere known dangers ordinarily incident to his service, without negligence on his part, then his injury is ascribed to one of the ordinary risks of employment which he assumed in entering upon the service."

In *Wright vs. Yazoo & M. V. R. R. Co.*, 197th Fed., 94, it is held:

> "While the dictrine of assumption of risk sometimes shades into that of contributory negligence, there is a clear distinction between the doctrines, an employee being held to assume the risk of ordinary dangers of his occupation and also those risks which are known to him and are so clearly observable that he may be presumed to know of them, while contributory negligence constitutes omission of an employee to use those precautions for his own safety which ordinary prudence requires."

In *Barker vs. Ry. Co.*, 88th Kansas, 767, 6th syllabus:

> "Assumption of risk is a good defense to an action under this act, except when the violation by the carrier of some statute enacted for the safety of employees has contributed to the injury or death of the

> employee. And when such defense is pleaded and supported by the evidence it is the duty of the court to instruct thereon."

However, in the case at bar, the court instructed the jury to disregard the portion of the answer relating to the Federal act and failed and refused to charge on the subject of assumption of risk.

We think that we were materially prejudiced by the court charging the jury upon contributory negligence in such a manner as to require them either to find that there was no contributory negligence or else defeat the plaintiff altogether. We were entitled to have the question go before the jury on the basis prescribed by the Federal act, under which the jury would find for the plaintiff and yet mitigate the damages in consideration of his contributory negligence. Under such instructions the verdict might have been much less. The trial court was influenced entirely by section 6245—1 of Ohio statutes, which requires that all questions of negligence, contributory negligence and assumption of risk, shall be for the jury; sections 9017 and 9018 of Ohio statutes. This case being subject to the Federal Employers' Liability Act, the entire Ohio statute is superseded, and all questions as to the defendant's liability, and particularly the fundamental question as to whether there is evidence of facts on which a jury would be justified in finding the defendant guilty of negligence and as to whether any facts which the jury may find on the evidence can show negligence which was the proximate cause of the accident, are to be determined not by the Ohio statute, but by the common law.

Seaboard Air Line Ry. Co. vs. Horton, 233 U. S., 492 (noting especially pages 501 and 502).

South Covington & C. S. R. R. Co. vs. Finans, admrx., 153rd Ky., 340.

The Facts in This Case Present a Question of Law for the Court.

We think that under the common law the question of whether it is negligence to operate a passenger train and a light engine, the latter running backwards, on parallel tracks, opposite each other, is a question of law for the court, and that we were prejudiced in having this case treated under the statute, which appears to make it a question of fact for the jury. Take the plaintiff's own story, and it shows that both the passenger train and light engine were running fast, and that he stepped from in front of the passenger train to the track on which the light engine was running, and was enveloped in a cloud of smoke or steam from the passenger train, so that he could not see the light engine approaching; therefore the court should have held as a matter of law that the absence of a lookout on the engine was not and could not have been the proximate cause of the accident. If he could not see the engine, certainly the engineer or other person on the lookout could not see him. An engineer is bound to exercise only reasonable care in the management of his engine, and when operating in the open country, as in the case at bar, is not obliged to have his engine under such control that he can stop it instantly.

O'Brien vs. Erie R. R. Co., 210th N. Y., 96.

Chrystal vs. Troy & Boston R. R. Co., 105th N. Y., 164.

On the plaintiff's own story, unless the engine was under such control as to have stopped instantly, the utmost vigilance of a lookout would not have prevented the occurrence of the accident, so that it comes down to the question as to whether the running of this engine at a high speed backwards on a track parallel with the passenger train, and opposite to the passenger train, can be considered negligence.

In the case of *Boldt vs. New York Central R. R. Co.*, 18th N. Y., 432, the facts were as follows:

> "The defendant was engaged in the construction of new track parallel to and about six feet distant from its old track, which was then in use. At the time of the accident the new track had not been completed and no trains had run upon it, except some carrying ground for ballasting. The plaintiff was a laborer who had been employed about a month, under the direction of an agent of the defendant, in graveling and leveling the new track being hired for this purpose only. He was walking, early in the morning from his residence along the new track to the place where he was to work, when he was overtaken and struck down by a train of passenger cars, running upon the new track in consequence of the old track being obstructed by an engine disabled upon it from an accident in the previous night."

It was there held he could maintain no action. In the opinion the court says:

> "So in the case at bar, he must be taken to have contracted with reference to the possibility of cars being run on the new track, whenever it became so nearly finished as to render such running practicable."

Under the common law we think it is clear under the facts in this case that the plaintiff assumed the risk as a matter of law and that the assumption of risk was so clear as to require the case to be taken from the jury, there being no Federal statute requiring it to be submitted. Under the common law, one of the risks assumed by trackmen is certainly the running of trains on the track on which they are working, provided the trains are run in the usual manner, that is, in the manner in which he knows they are accustomed to be run.

The plaintiff's walking on the tracks had no direct connection with the accident. It was his act in stepping off of the track he was walking on to the other track, instead

of into a position at the side of the track, where he would have been absolutely safe, which made the accident inevitable. The record is full of evidence showing that he could easily have stepped to the side of the track and remained there in perfect safety until the passenger train passed, but he chose to step into a place of danger, by stepping onto the other track. His act of stepping upon the track immediately in front of the backing engine was the proximate and concurrent cause of his injury. In this case, the plaintiff could have stepped to a place of safety, but in blind reliance upon his assumption that no engine would come back on the other track, although the evidence shows that he knew of the custom, or ought to have known it, and he also alleges in his petition that when they had helped the train up to the top of the grade they always ran back, and there was no other way for them to couple up with their trains, preferred a place of danger to a place of safety, and stepped upon the track immediately in front of the backing engine, without looking or listening and was struck and injured. To an ordinarily prudent man a railroad track is itself a warning to be alert, to use his senses, to look and listen, and an ordinarily prudent man would not blindfold himself nor stop his ears when about to exercise his intention, disregarding a safe place and selecting a place of danger.

In the opinion of the Ohio Court of Appeals in this case (see Record, 22) we have this language:

> "Applying the rule laid down by the Supreme Court of Ohio, it is the act or service in which the injured party is engaged at the time of the injury that controls, and under the undisputed evidence in this case we hold that the provisions of the act referred to do not apply and that the several requests of the plaintiff in error in relation thereto were properly refused to be given to the jury by the court below."

So we have the question of the applicability of the Federal act squarely denied by the State courts.

In reference to the conduct of Marietta and what he was doing, on page 63 of the record, we have the following:

Said he helped build the track and repair the track (Record, 63); the roadbed is filled up between the ties with cinders and slag hammered down with a pick, and I (Marietta) helped put them in (Record, 64). When struck was not walking across the track, but was walking along where the trains run (Record, 71). I saw the engine that struck me when it was in operation pushing another train up the hill (Record, 71). I saw the combination, that is, the engine in front, train and engine behind, going up the hill before I reached the track (Record, 72); I was walking, with a cap pulled down over my ears (Record, 77); the smoke prevented me from seeing and the ear tabs on cap kept me from hearing on the other side (Record, 78). In a signed statement Marietta says: "I thought that the engine which struck me would shove the train farther up the hill, so did not pay attention to it." (See signed statement of Marietta, Exhibit "A" of record.) And he says in this statement that he read it over. Witness Hecht says on page 88 of record that he saw the train from which the engine that struck Marietta was uncoupled standing there at the grade, and this shows that it was in plain view, and could have been seen by Marietta. Witness Jennings says (page 109 of record) that he understood the engine had cut off from its own train to help another train up the hill, and he knew that it had no other way of getting back to its train except going backward over the same track it had passed over in pushing the train. And he says that he had seen that day after day while he worked there. And he says on page 115 that there is room enough to walk between the tracks, and he thinks there is probably five feet of space between the trains as they would pass each other. This shows from the record that Marietta either knew, or ought to have known, that this engine had been cut off from the train that was standing below a short distance from where he reached the track, and that this occurrence of one engine being cut off

and pushing another freight train up the hill was so frequently done that it was a matter of common knowledge, and therefore he must be presumed to have known it.

It is respectfully submitted that the Federal Employers' Liability Act applies to the cause of action presented in this case to the exclusion of the State law, and that the judgment of the Court of Appeals of Richland County, Ohio, which denied to plaintiff in error, rights, privileges, and immunities arising under the act of Congress, should be reversed and remanded for further proceedings.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 211.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

EVELYN J. PURUCKER, ADMINISTRATRIX OF BYRON B. MARIETTA, DECEASED, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

W. S. KERR,
Attorney for Defendant in Error.

(24,868)

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BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

The defendant in error, Byron B. Marietta, on the twenty-seventh day of July, 1912, instituted a suit for damages for personal injuries against the plaintiff in error, Erie Railroad Company, in the Court of Common Pleas of Richland County, Ohio.

The petition alleged that plaintiff was a boy of about nineteen years of age and that for a period of about six weeks he had been in the employ of defendant below as a section man or employee; that while walking on the track of defendant below on his way to work, on the fifth day of January,

1912, he was run over and injured by an empty engine running backwards alongside of a train on a double track, at great speed and without signals or look-out; that the engineer of the backing engine knew, or should have known, that the plaintiff and other employees of defendant were on the track on their way to work at that time, and that he was guilty of such gross negligence as to amount to wilful injury; that the engineer had under him a fireman whose duties he directed, and was therefore not a fellow servant of plaintiff below.

To this petition the defendant below (plaintiff in error here) filed an answer and submitted itself to the jurisdiction of the State court under the State law. It denied generally that plaintiff was at the time in its employ. And this, illustrated in the evidence, was the claim that plaintiff was on the track at six o'clock, and his work not beginning until seven o'clock, he was a mere trespasser. This issue was submitted to the jury and decided either that plaintiff was not a trespasser or that under the circumstances the defendant was liable even if plaintiff was a trespasser.

The defendant pleaded as a second defense the contributory negligence of plaintiff. This matter was presented as a defense, and in that form only cognizable under State laws.

Subsequently an amended answer was filed, differing from the first answer only in that it added the defense, in substance, that if plaintiff was in its employ it was with respect to instrumentalities used in interstate commerce.

A part of said third defense reads as follows:

> "And that if plaintiff's being on defendant's premises at the time of his being so injured was because of his being in its employ (*which it denies*), or by virtue of any direction, permission or license given him as its employee (which it also denies), plaintiff can maintain no action against defendant for such injuries not brought by virtue of the act of Congress, etc."

A reply was filed denying each and every allegation of this defense.

The case was tried throughout as a case under the State law.

The court was requested to charge defenses only arising under the State law.

There was a verdict for the plaintiff and judgment.

The motion for a new trial submitted to the trial court questions arising alone under the State law. (See pp. 12 and 13, Record.) The motion was overruled and a petition in error filed in the Court of Appeals. Here the defenses referred to, arising under the State law, were argued and submitted to the Court of Appeals.

The Court of Appeals affirmed the judgment upon the ground that the plaintiff had a right to recover under the laws of the State of Ohio.

This court also reviewed the evidence upon the claim of plaintiff in error (the railroad company) that the judgment was against the weight of the evidence, and found that the court and jury had not erred as to the evidence upon any material question.

Plaintiff in error here filed a motion in the Supreme Court of Ohio, praying for an order requiring the Court of Appeals to certify its record to that court for review upon the questions and defenses made in the courts below. This motion contained grounds which alone related to State law, as that two Ohio courts had decided the questions alleged to be involved differently, and that questions of great general interest (to the people of Ohio) were involved.

This motion was overruled, and plaintiff in error filed a petition in error in the Supreme Court of Ohio, assigning as errors the action of the lower courts upon the questions of State law, referred to. This petition was dismissed.

The Facts.

We deny the statement in the brief of counsel for plaintiff in error that if plaintiff below had looked he would have seen the engine backing down on him. He testifies as follows: "Well, I kept looking back and as the passenger train was just about past me something struck me" (p. 56, Record).

We also deny that plaintiff below could see the engine backing, or from his position see, as is claimed, the train from which the engine had been detached. (See pp. 71 and 72, Record.) We also deny that the evidence shows that engines frequently cut loose from their trains and pushed other trains, to the knowledge of plaintiff below. He testifies that he never knew of it being done (pp. 71 and 72).

There is no evidence in the record that at any time before the injury to plaintiff below, an engine had been backed the wrong way of the track at high speed (or at any speed) alongside of another train. The particular position of the train and engine was peculiarly dangerous, of which plaintiff below had no knowledge, and could have had none. So he could not be held to have assumed a risk that was not an ordinary hazard, but exceptional and extraordinary.

There was no sufficient evidence that the defendant below was engaged in interstate commerce, and no evidence that plaintiff was an employee engaged at the time of his injury in interstate commerce.

Under the pleadings the burden was upon defendant to establish:

First. That it was engaged in interstate commerce at the time plaintiff was injured, and

Second. That plaintiff was injured while employed by defendant in such commerce.

The evidence on the first point was incompetent and insufficient to establish the fact.

The evidence shows that the last work the engine that run over plaintiff did was to push or help a train up a hill or

grade, and had been uncoupled and was backing down empty when plaintiff was injured.

There is no evidence that the train pushed had interstate cars or freight.

The engine was in charge of an engineer, fireman and brakeman, whose run or employment was wholly in Ohio.

The evidence (objected to by plaintiff) was as follows: The conductor of a train that this engine had been attached to before it pushed or helped the train referred to up the grade, testified that the freight bills showed that three to five cars were to points outside of Ohio. (See pp. 141 and 142, Record.) This evidence was not the best evidence, the bills not being produced, nor competent evidence against the plaintiff.

Again, an engineer of a passenger train was called and he testified (against objection) that his train was a Wells-Fargo express, and that it ran from Chicago to New York, as he understood. But he admitted that his run was altogether in Ohio, and that he had never been on the train outside of Ohio, nor had any personal knowledge on the point (p. 178, Record). (See evidence of Mochel, train dispatcher, p. 187.)

There was no evidence as to the nature of plaintiff's employment. It was admitted in the answer that he was employed on the section, but as to what he did there is no evidence. For aught that appears he may have been working wholly in intrastate work. It was undisputed, however, that at the time plaintiff was injured he was not employed by defendant in any work. So it was not shown that he was injured "while employed" in interstate commerce.

It was claimed by defendant that plaintiff was a trespasser, a mere licensee, etc.—attitudes not necessarily cognizable by Federal authority, but presumptively within the State law.

On the evidence, the jury could have found that plaintiff was on the track too early for work, and was a trespasser, but that the act doing him injury was such that he was entitled to recover under the Ohio laws, or that he was there under a license as an intrastate employee. If so, no Federal authority exists to revise the conclusion.

ARGUMENT.

The statement or assignment of errors filed by plaintiff in error has six specifications.

The first specification alleges that defendant below was deprived of the defense of assumption of risk, as allowed by the Federal Employers' Liability Act.

The second alleges that the trial court erred in holding that the case was governed by sections 6245 and 9017 of the General Code of Ohio.

The third complains of the refusal to charge a request set forth in full on page 6 of the brief of counsel for plaintiff in error.

The fourth complains of the refusal of the court to charge a request set forth in full on page 6 of brief.

The fifth complains of the court as to the assumption of risk, and in withdrawing the third defense.

The sixth complains of the Court of Appeals for affirming the judgment of the Court of Common Pleas, and in overruling a motion at the close of all the evidence to direct a verdict for defendant below.

The first two errors can be examined together. It is not true, as declared in the second specification, that the trial court held that the case was governed by sections 6245 and 9017 of the General Code of Ohio. The record will show that no such holding was made. These sections do not apply to the case. They modify the defense of the assumption of risk, but only in particular cases. We will set forth both of said sections, and the court will see that they do not apply to men employed as plaintiff was employed when injured. Section 6245 is a section of chapter 17 of the Ohio Code, and applies only to men in mining, manufacturing and mechanical trades. Chapter 17, in section 6245, provides: "The fact that such employee continued in his employment with knowledge of such omission shall not constitute a defense in such action." The *omission* referred to is to guard machines

and appliances. The chapter has no application to railroad employees, and was not applied in this case.

Section 9017. The first paragraph of this section applies only to employees injured "by a defect in any locomotive, engine, car, hand car, rail, track, machinery or appliance required by such company to be used by its employees." It will be seen that this has no application to the case at bar, and the record will show that it was not applied by the court. The modification of the defense of assumption of risk is confined to cases where a defect caused the injury.

The second paragraph of section 9017 provides:

> "While such employee is engaged in operating, running, riding upon or switching passenger, freight or other trains, engines or cars, and in the performance of his duties, and when such injury was caused by the carelessness or negligence of any other employee, officer or agent of such company in the discharge of or for failure to discharge his duties as such."

This only applies to men engaged in operating * * * trains.

The defense of assumption of risk in Ohio in the case at bar is the common-law defense, and this the defendant below had the advantage of to the full extent to which it entitled itself in the trial. The defense under the Federal Employers' Liability Law is the same as it is in Ohio in cases of this character. There is no evidence showing that plaintiff below knew of or could have known of the sudden combination of circumstances which caused his injury. It was not one of the ordinary hazards of the employment, and it cannot be justly claimed that plaintiff below assumed the particular hazard which caused his injury, and if so the defendant was not entitled to the defense under the evidence.

The court charged as follows:

> "The railroad track being a place of danger, the plaintiff would be required to recognize such danger

> and to use his faculties of sight and hearing to avoid possible danger that might arise from the movements of trains upon the tracks" (p. 201, Record).

The request to charge as shown in specification three was properly refused because it did not contain any conditions upon which it might be found that plaintiff was at the time employed in interstate commerce, so that it could be found that he assumed the risk by merely walking on a highway of interstate commerce. A request should submit the facts as to the cause of injury to be found, whether by reason of the ordinary hazards the plaintiff was injured or whether he had knowledge of the conditions and assumed the risk. This request assumed that if plaintiff, irrespective of the nature of his employment, walked the track he assumed the risk. This is not the law, and it is the only request or suggestion during the trial that even referred to the presence of a Federal question.

The answer does not raise a Federal question, because it specifically denies that plaintiff was in its employ when injured. We submit that a railroad company cannot invoke the shield of the Federal Employers' Liability Act unless it alleges, or admits, unequivocally, that at the time of injury plaintiff was being employed in interstate commerce.

Under the Federal Employers' Liability Act a railroad employee does not assume risk of negligence of fellow servants.

Fourth syllabus, Portland Terminal Co. *vs.* Jarvis, 141 C. C. A., 562:

> "A railroad employee, who is within the operation of the Federal Employers' Liability Act, does not assume risks of injury arising from the negligence of his fellow servants."

If the defendant could be tried under the Federal act it could not make the defense of assumed risk, because the negligence complained of is that of fellow servants, and it

has been established by the evidence, and the Ohio appellate court has approved it.

It has been held by this court that it is not error to fail to charge the jury as to assumption of risk where there is no evidence showing that the injured employee knew of the danger, or where there was no request to charge.

Central Vermont Ry. Co. *vs.* White, 238 U. S., 507.

We believe that this case comes clearly within the rule of the case of Chicago & Northwestern Ry. Co. *vs.* Wm. H. Gray, 237 U. S., 399. This case holds that a judgment for an employee should not be reversed "where the railway company's position was made no worse because the case was tried upon the hypothesis that the State law governed." (From the syllabus.)

The Gray case presents practically the same facts as the case at bar. The injured employee was employed to dispatch engines used in both interstate and intrastate commerce. At the time of injury he was not engaged at anything, but he was walking to a place where he might be ready for the next engine. While crossing the track, his vision being limited by smoke from a cinder pit, he was struck and injured. The case is reported in 153 Wisconsin, 638, and there the following facts appear: The employee worked until 8:30, then went to the depot to get his pay check, then went to a grocery store, and to a saloon nearby. He then returned to the round house, after an absence of fifty minutes. He remained there about three-fourths of an hour, then he walked along the track. Before crossing the track where he was injured he looked, but smoke and steam from a cinder pit being cooled with water, obstructed his vision, and in crossing he was struck. The exact question made here was made in the Supreme Court of Wisconsin, viz., that the employee being partly engaged in handling engines used in interstate commerce, he was employed in interstate commerce. The sixth syllabus of the case (153 Wis., 638) is as follows:

> "An employee whose duty it is to care for and dispatch engines used in both interstate and intrastate commerce cannot be said to be employed in interstate commerce during the entire time, especially not during the periods of leisure or rest while merely waiting for the arrival of an engine."

On page 646 it appears that the question of whether the Federal law applied was eliminated from the case, and the railroad company brought the case to this court.

The plaintiff in error complained that it had been deprived of the defense of assumption of risk because the case was tried under the State law, and evidence rejected to show the character of employment. This court held that assumption of risk, under the Wisconsin statute, was a case of contributory negligence, and the jury having found that the plaintiff below was not guilty of contributory negligence, he could not have assumed the risk.

On page 399, Mr. Justice Holmes says:

> "There are differences and similarities between the Wisconsin and Federal statutes, but we do not perceive that there is any difference that made the railroad company's position worse if tried on the hypothesis that the State law governed."

It was further held that the liability of the company was substantially the same under either act.

In the case at bar the railroad company's position was better under the State law than it would have been if the Federal act had been applied. It had the advantage of the common-law defense of contributory negligence, which it could not have had under the Federal act. There were no facts to raise the defense of assumption of risk, but the conduct of the plaintiff below was thoroughly scrutinized with respect to the defense of contributory negligence, and the jury found no negligence on his part, so there could have been no advantage to defendant in applying the Federal act more than in the Gray case. (See Southern Ry. Co. *vs.*

Gadd, 233 U. S., 572; R. R. Co. *vs.* Wright, 239 U. S., 548, the same point; also Kansas City Western Ry. Co. *vs.* McAdow, 240 U. S., 51, see fifth syllabus.)

Fifth syllabus:

> "The Supreme Court of the United States will not on a writ of error to a State court in a case in which the plaintiff has expressly pleaded the Federal Employers' Liability Act, decide whether such act or the State statute applies, where the two statutes are so similar that the liability of the defendant against whom judgment was rendered does not appear to be affected by the question."

In Chicago, R. I. & P. Ry. Co. *vs.* Wright, 239 U. S., 548, this court held that the State court erred in holding that the injured employee was not engaged in interstate commerce, but, notwithstanding, affirmed the judgment for the employee upon the ground that the instruction as to contributory negligence was more favorable to the defendant company than if the case had been tried under the Federal act, and therefore there was no error.

In Kansas City Western Ry. Co. *vs.* McAdow, 240 U. S., 51, this court affirmed the judgment for plaintiff below, and concludes the opinion with the following words:

> "But these questions really are immaterial here since the Kansas statute is so similar to that of the United States that the liability of the defendant does not appear to be affected by the question which of them governed the case. In such case it is unnecessary to decide which law applied" (citing the *Gray case*, 237 U. S., 399).

In the case of Riley *vs.* Minneapolis & St. Louis R. R. Co. (Minn. case), 156 N. W., 272, the court in the opinion says:

> "The action is founded upon the Federal Employers' Liability Act * * * and complaint is made that the trial court did not in the charge instruct fully as to the rights and liabilities of the parties thereunder. Defendant points out no reason for the

> conclusion that it was prejudiced by the failure of the court in this respect. The only omissions we discover are the failure to state the effect of contributory negligence under the Federal act, and refer to the rule of assumption of risk. But this is not prejudicial. There is no evidence of negligence on the part of the plaintiff and he was wholly unaware of the pressure of the wire, and did not therefore assume the risk."

This is exactly the fact as to plaintiff's knowledge of the particular danger in this case.

The Supreme Court of Ohio, in Erie Railroad Co. *vs.* Welsh, 80 Ohio St., 81, had before it the question of alternate employment in interstate and intrastate commerce, and an injury occurring during a cessation of work. Welsh had finished shifting a caboose, which the evidence did not show was interstate commerce, and he was on his way when injured for orders for other work, which it was shown would have been interstate commerce. The court held that the determining time was the time of injury and if the evidence shows that at that time he was not being employed in interstate commerce the Federal act did not apply. (See pp. 21 and 22, of the record, where a part of the opinion is set forth in the opinion of the Court of Appeals.)

We quote a few lines from this Ohio Supreme Court case:

> "The important inquiry is as to what he was doing at the time the accident occurred, and it appears without dispute in this record that he had finished the duties required of him by prior orders of the master and was at the time of the injury proceeding to the master's office for further orders and direction as to his services, so that he was not then and there employed in moving or handling cars engaged in interstate commerce."

Doherty on Liability of Railroads to Interstate Employees, on page 97, says:

> "According to the interpretation already given by the courts, general service in the performance of duty

> relating to interstate commerce is not sufficient. The particular service in which an employee is engaged at injury must have direct relation to the interstate traffic in which the railroad is engaged."
>
> Chicago, Burlington & Quincy R. R. Co. *vs.* Harrington, 241 U. S., 177.
>
> Delaware, L. & W. R. Co. *vs.* Yurkonis, 238 U. S., 439.

The recent case of Illinois Central Railroad Co. *vs.* Behrens, 233 U. S., 473, interprets the Federal act in the same way. That is, the employee must at the moment of injury be employed in interstate commerce. In this case the evidence showed that Behrens was engaged in both kinds of commerce, either alternately or at the same time, prior to his injury. At the time he was switching intrastate cars, but his next work would have been interstate. The court held that what he would have done immediately after injury or what he had done before was not controlling.

That plaintiff's connection with interstate commerce was too remote see:

> Ill. Central R. R. Co. *vs.* Rogers, 136 C. C. A., 530.

In the case at bar the boy injured had done nothing for twelve hours; it was a period of rest as in the *Gray case*. He was injured before he had resumed work in the morning. There was no evidence as to what he had done the day before and it was immaterial what he would have done next unless he was under an imperative order to proceed to a particular interstate commerce work, of which there is no evidence. His connection, if any, with interstate commerce was not direct; it was remote. It could only be found by inference.

The Federal Employers' Liability Act contemplates actual employment at the time. And if the evidence does not show actual interstate employment, it cannot be inferred, especially from any evidence in this case. The only fact that appears is that plaintiff below was employed on a section under the control of a section foreman. No inference can be drawn

from this fact. Osborn *vs.* Gray, 241 U. S., 16. Held: That court will not take judicial notice that cars come from without the State. The burden is on the party invoking the Federal act to prove affirmatively that the company was engaged in interstate commerce, and at the moment of injury it was employing the servant in interstate commerce. Erie R. R. Co. *vs.* Van Buskirk, 228 Fed., 489 (C. C. A. case). In this case the injured employee was 150 feet away from his interstate commerce work. Held, not in interstate commerce work.

The undisputed fact is that plaintiff below was walking on the track toward a point where his work would begin, or from which he would be carried to a place of work. What he was to do depended on the orders of the foreman. He might be set to do something that had nothing to do with interstate commerce. He might mend a ditch to prevent flooding on adjacent owner's land, or put to work on a siding not used for interstate commerce. No case has yet held that merely being a section man justifies an inference that at a particular moment he was being employed in interstate commerce. The law of the forum governs unless it is made to appear affirmatively that some other law controls.

See also:

Yazoo & M. Valley Ry. Co. *vs.* Wright, 235 U. S., 376.
Shanks *vs.* R. R. Co., 239 U. S., 556.

In the case of the Seaboard Air Line Railway Co. *vs.* Duvall, 225 U. S., 477, it is held that the defendant must request special charges as to the Federal act applying. Here the defendant did not request the court to charge that the Federal Employers' Liability Act applied, or to charge any of its terms as a defense. The motions to direct a verdict did not refer in any way to the Federal act, or claim any right or immunity not allowed by the State law. In the motion for a new trial no reference was made to the Federal act, and no ground stated with respect to it. (See p. 12, Record.)

Seaboard Air Line Ry. Co. *vs.* Duvall, 225 U. S., 477.

Second syllabus:

> "To sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a State on the ground that there was set up and denied a right, privilege or immunity claimed under a Federal statute, it must appear from the record that there was necessarily present a definite issue *as to the correct construction of the act so directly* involved that the State court could not have given the judgment it did without deciding against the contention of the plaintiff in error."

The second request, on page 6 of the record, was properly refused, because it embodied the question of contributory negligence, which was fully charged, and because the evidence showed that there was no place to walk on the south side of the track, and that plaintiff had no reason to anticipate an engine running the wrong way of the track, alongside a train running east.

The 219 Mass., 351, holds that it is the evidence that determines whether the case is under Federal act, and not the allegations of the pleading.

It is held in 102 N. C., 343 (Myers *vs.* Norfolk & Western Ry. Co.), that an employee employed in repairing tracks used for both interstate and intrastate commerce, injured on Sunday while attempting to board a train in order to get the mail of men at the work camp, was not within the Federal act.

In Bennett *vs.* Lehigh R. R. Co., 197 Fed., 578, held that an employee injured while riding home on a coal train made up in part of interstate cars, by permission of the carrier, is not within the Federal act, although under the carriers' rules he might be called in to work on a train if his services were needed.

In Heimbock *vs.* Lehigh R. R. Co., 197 Fed., 579, held that employees killed while repairing a car which had been used in interstate commerce, but at the time had completed

its trip and was standing on a siding, were not engaged at the time in interstate commerce.

Marietta for at least twelve hours had not been employed at any work for the defendant below. In a broad sense he might be said to be an employee of the railroad company during the night, but not in the sense of the Federal law, that at the moment of injury he was being employed by the company in interstate commerce. The cases which hold that an employee may recover under certain circumstances while on his way to work or going from work, are based upon an implied license and not at all upon actual employment, as is required by the Employers' Liability Act. No such inference could be drawn where, as in this case, the person injured might be employed in intrastate commerce, or in view of the well-known fact that a railroad employee, even on interstate roads, may be employed in both kinds of commerce alternately. The railroad company has the burden of proving that at the moment of injury the person was being employed in interstate commerce not inferentially, but actually. The cases make impressive this distinction because the constitutionality of the act depends upon the actual employment of the employee in interstate commerce at the time of injury.

As to the Cases Cited by Counsel for Plaintiff in Error.

The first case is Toledo, St. Louis & Western R. R. Co. *vs.* Slavin, 236 U. S., 454. In this case the undisputed evidence showed that the plaintiff was employed at the time on a train in interstate commerce. This fact was not disputed. The record shows that his action was based upon an Ohio statute which abrogated the defense of assumption of risk. The case shows that the trial court held that there being a defect in the track, the defense was not available. Thus the defendant was deprived of the defense and prejudiced. This case, limited to its facts, has no application. The second syllabus says:

"Where the evidence on the trial shows that the train on which the plaintiff was riding at the time of the injury was engaged in interstate commerce."

In the case of Pederson *vs.* Delaware, etc., R. R. Co., 229 U. S., 146, the employee was actually employed in the work of carrying bolts in the building of an additional track on a bridge of an interstate carrier. The court below held that the part of the bridge building had not yet been used for interstate commerce. Inasmuch as the bridge was one structure before and after addition, and used to carry interstate tracks, the Federal act applied. There are no such facts presented in the case at bar.

In North Carolina R. R. Co. *vs.* Zackery, 232 U. S., 248, the fireman of an engine used in interstate commerce had already commenced work; he had fired the engine and oiled it, and while waiting to start it was supposed that he started to his boarding house nearby and in crossing a track was injured. There could be no reasonable doubt as to his actual employment at the time of injury, and it was in interstate commerce.

In St. Louis, etc., R. R. Co. *vs.* Seale, 229 U. S., 156, a yard clerk, as a part of his actual and present employment, was in the railroad yard walking toward an interstate train to take the numbers of the cars, when he was injured. This could not apply as a rule to the case at bar.

In all the other cases cited, the injured employee was being employed in interstate commerce, except perhaps the *Tucker case* (35 App. C. C., 123). In this case there was no question as to the employee being employed in interstate commerce, and he was injured while crossing a track to his engine. This case is directly contrary to the theory upon which the defendant defended in the State court. It denied in its answer that at the time of injury plaintiff was in its employ at all. It submitted proof tending to show that plaintiff was on the track at six o'clock, when he had no duties either of work or otherwise to perform. It claimed

that he was a trespasser. This defense, and its claim in this court that plaintiff was at the time of injury engaged in interstate commerce, are so inconsistent that they cannot stand together. The formal denial that plaintiff was at work or on duty at the time of injury ought to operate as a bar to defendant making such question now. The rule which we think should be applied is the rule applied in the case of Wabash R. R. Co. *vs.* Hayes, 234 U. S., 86.

In this case there were allegations with respect to both Federal and State laws, so that the action might be maintained under either the Federal or State law. At the request of the defendant, the court held that the Employers' Liability Act of Congress did not apply, and submitted the case to the jury under the State law. The analogy as to the conduct of defendant in this case and the case at bar is quite close. In both cases the defendant, by an affirmative act, excluded the application of the Federal act. In the case cited, by requesting the court to hold that it did not apply; and in this case, by denying in its answer the fact upon which depended the application of the law. In the *Hayes case* this court holds that the defendant was concluded by its act. (See requests to charge 3 and 6, p. 203.)

The cases cited by counsel for plaintiff in error with respect to the charge of the court as to contributory negligence and assumption of risk have no application, because the defendant below made the defense of contributory negligence in its answer. It also requested the court to charge the defense. (See request 5, p. 203, Record.)

The two requests to charge, page 203, are as follows:

> Request 3. "If the plaintiff was intending to go to a point on the railroad called Old Summit Tower, to go to work at seven o'clock, central standard time, and was struck and injured at or within a few minutes of six o'clock, of said standard time, then the company owed him no duty."
>
> Request 6. "It is not claimed that plaintiff *at and just prior* to his injury was in actual employ of the

company, or under or subject to its immediate direction, and whatever he did was his own act, and if he saw fit to take chances, he assumed the hazard."

These requests show the attitude of counsel for defendant in the trial of the cause. They planted the defense on two grounds, viz., contributory negligence, and that plaintiff was not employed by the defendant *at the time of his injury.* The first was the full defense allowed under the State or general law; the other excluded the Federal Employers' Liability Act, by denying that plaintiff was at the time employed in interstate commerce. The Federal statute provides plainly that it applies only when the employee is *at the time of injury* being employed in interstate commerce. Can a defendant, after expressly denying that the plaintiff was at all employed by it at the time of injury, and after having requested the court to charge that it was an *admitted fact* that plaintiff at the time of injury was not in the actual employ of the company, be permitted to claim that he was employed at the time in interstate commerce?

The first request to charge (found on page 202 of the Record, and page 6 of counsel's brief) is not a request to charge the rule that an employee assumes the ordinary risks and danger of his employment, because of his employment. This request recites, "If the plaintiff, for his own convenience, voluntarily went along the tracks * * * he assumed the risk and danger of *so using the tracks.*" Not using the tracks as an employee while employed in interstate commerce, but using them for his own convenience and voluntarily. This negatives the act being one in his employment, and while employed he was injured by one of the ordinary risks of his employment. It suggests the idea of a trespasser; one acting outside his employment, for his own purpose.

The case of Lamphere *vs.* Oregon R. & N. Co., 196 Federal Reports, 336, is cited. In that case the plaintiff was under imperative orders of the company to proceed to a specified point and take the place of a man engaged in interstate com-

merce, and while under this order he was injured. His actual employment in interstate commerce began when he commenced to execute or obey the order. The Court of Appeals, in reversing the court below, puts its decision upon the fact that the injured employee was proceeding under an imperative order to do interstate commerce work.

The Federal Employers' Liability Act was passed to give employees on interstate roads a better remedy than they had before. It was an act for the employees and not for the railroads. The courts have been quite liberal in its construction to carry out the purpose of its enactment and afford remedy to those intended to be remedied, but the courts have shown no disposition to construe the act broadly for the purpose of defense, where plain error prejudicial to the defendant has not occurred. The last case reported upon this point (R. R. Co. *vs.* Gray, 237 U. S., 399) illustrates this. In the case at bar the law of Ohio gave the defendant full opportunity to make any defense it could have made under the Federal act. The defendant participated in the trial, arguing every ground of defense. It was defeated after a fair trial, in which there were no errors to its prejudice, and its position now is to secure a second trial on the same defenses, and defeat any recovery whatever. The defendant did not ask the application of the Federal act; it did not ask any construction of it, nor that any of its terms be charged to the jury. The judgment can be sustained under State law, and does not necessarily involve a decision on the Federal act. It has been held in 50 Ohio St., 136, that persons disconnected with the railroad may under certain circumstances walk upon the tracks of a railroad without being chargeable with negligence. There was no Federal question necessarily involved or decided.

We therefore submit respectfully that the writ of error should be dismissed, and the judgment below affirmed upon the ground that no harm has been done the plaintiff in error.

W. S. KERR,
Attorney for Defendant in Error.

Judgment reversed.

ERIE RAILROAD COMPANY *v.* PURUCKER, ADMINISTRATRIX OF MARIETTA.

ERROR TO THE COURT OF APPEALS OF RICHLAND COUNTY, STATE OF OHIO.

No. 211. Argued April 23, 1917.—Decided June 4, 1917.

A request to charge must be calculated to give the jury an accurate understanding of the law with reference to the phase of the case to which it is applicable.

Plaintiff, employed to work upon the tracks of a railroad company, while walking east on the east-bound track to a place of work appointed by his superior, stepped over to the west-bound track to avoid an east-bound train and was run down by an engine backing, without warning signals, on the west-bound track, and was injured. There was evidence that he did not see the engine because of steam and smoke from the avoided train and that those in charge of the backing engine did not see him. *Held:* (1) That a request to charge that if plaintiff was using the tracks voluntarily for his convenience he assumed the risk, was too broad, in ignoring the circumstances which induced him to use them and in taking for granted his knowledge of the conditions, especially the possibility of negligence in backing the engine without warning. (2) That a request to charge that, if plaintiff, in getting off the track on which he saw the train approaching, could with safety and reasonable convenience have stepped to the right or south of such track, and by his own choice stepped on the other track and was struck by a train thereon, he assumed the risk of such choice—was open to the same objections in not covering the elements of assumed risk, and was more properly applicable to the defense of contributory negligence.

Under the Federal Employers' Liability Act, an employee does not assume a risk attributable to the negligence of his co-employees until he is aware of it, unless the risk is so obvious that an ordinarily prudent person in his situation would observe and appreciate it.

Affirmed.

THE case is stated in the opinion.

Mr. C. E. McBride, with whom *Mr. N. M. Wolfe* was on the brief, for plaintiff in error.

Mr. W. S. Kerr for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Byron B. Marietta brought this suit against the Erie Railroad Company, to recover damages for injuries alleged to have been caused to him by the negligence of the Company. He died pending this proceeding in error and the case was revived in the name of his administratrix. Marietta was what is known as a section man in the em-

ploy of the Company, and had been such for a period of about four weeks before the injury happened. It was his duty to work on the track of the Company wherever directed by the section foreman on the section extending from Pavonia, in Richland County, Ohio, westward for a distance of several miles. The Erie Railroad Company was engaged in both interstate and intrastate commerce. The testimony shows that it was customary for the section foreman to direct Marietta where to work and to tell him on the previous day where to report for work on the following day. On the day before the injury was incurred, he was directed by the foreman to report at a point on the section about a quarter of a mile east of a certain tower, located upon the defendant's track. Early on the morning of the day of the injury, he started from his residence to report to the foreman accordingly. It appears that at and near the place of injury the Company has a double track; that the north track is used for trains going west and the south track for trains going east; that the plaintiff in going to the place designated went upon the south track and was walking eastwardly, when a passenger train bound east came upon this track, and to get out of the way of it he stepped over upon the north or west-bound track; that while walking on that track he was struck and run over by an engine which was running backward and in the opposite direction from that in which trains ordinarily ran upon the north track. This engine had been detached from a train of cars and after pushing another train up a grade on the west-bound track was returning to its own train at the time of the injury. Marietta testified that he had no warning and did not see the approaching engine owing to steam and smoke from the passenger train, which had just passed upon the other track. The engineer and fireman of the backing engine testified that they did not see Marietta until after he was run over by the engine and gave no signal or warning of its approach.

The case was brought, and by the state court was tried, under the state law. No objection reviewable in this court involves the correctness of the charge of the trial court submitting the questions of negligence and contributory negligence to the jury. The Company brings the case here because it contends that it alleged and showed that it was an interstate railroad, engaged in the carriage of freight and passengers between States, and that the train of cars from which the engine which struck Marietta was detached and to which it was returning was engaged in interstate commerce; that inasmuch as he was a section man or track man, employed to work upon the track of an interstate railroad, and was proceeding to his work at the time of his injury, both parties were engaged in interstate commerce and the Federal Employers' Liability Act applied to the case, and that because of the refusal of the trial court to charge as to assumption of risk the Company was deprived of the benefit of that defense.

The Court of Appeals treated the case as one controlled by the state law, and held that the Employers' Liability Act did not apply, as in its view Marietta was not engaged at the time of his injury in interstate commerce, and affirmed the ruling of the trial court in refusing the two requests to charge which are the basis of the assignments of error in this court. These requests were: (1) "If the plaintiff, for his own convenience, voluntarily went along the tracks of the railroad, and this railroad was being at the time used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks"; and (2) "If the plaintiff in getting off the track on which he saw a train approaching could with safety and reasonable convenience have stepped to the right or south of such track, and by his own choice stepped on to a parallel track and was struck by a train on such parallel track, he assumed the risk of such choice." The

refusal to give these requests raises the only federal question in the case.

Conceding, without deciding, that the Federal Employers' Liability Act applied to the circumstances of this case, nevertheless the two requests were properly refused. A request to charge must be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable. *Norfolk & Western Ry. Co.* v. *Earnest*, 229 U. S. 114, 119. The first request simply asked a broad charge that if the plaintiff voluntarily, for his own convenience, went upon the tracks of the railroad, and the railroad was at the time being used and operated as a highway of interstate commerce, he assumed the risk and danger of so using the tracks. This request omitted elements essential to make assumption of risk applicable to the case. It failed to call attention to the circumstances under which the testimony tended to show the plaintiff was using the tracks at the time, and the knowledge of conditions which should have been taken into consideration in order to attribute assumption of risk to him. It failed to take into account the undisputed testimony that the engine ran into Marietta without signal or warning to him. Under such circumstances the injured man would not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it. *Chesapeake & Ohio Ry. Co.* v. *De Atley*, 241 U. S. 310, 313, 314; *Chesapeake & Ohio Ry. Co.* v. *Proffitt*, 241 U. S. 462, 468, and cases cited.

The second request pertained to the conduct of the plaintiff, in view of the particular situation, and what he should have done to protect his safety, considering his danger at the time, and is open to the same objections. This request did not cover the elements of assumed risk

and was more properly applicable to the defense of contributory negligence, concerning which the court must be presumed to have given proper instructions to the jury.

Affirmed.